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IN THE

Supreme Court of the United States
OCTOBER TERM, 1996

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK

Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 8, 1996

WPP

QUESTIONS PRESENTED

1. Whether a district court in which a bankruptcy Chapter 11 case is pending against a tortfeasor debtor corporation is authorized or required to exercise jurisdiction over suits against non-debtor joint tortfeasors on the ground that these suits are "related to" the bankruptcy under 28 U.S.C. §1334(b) based upon the right of the nondebtors to pursue claims for contribution against the debtor corporation.

2. Whether 28 U.S.C. §157(b)(5) empowers a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation to transfer to itself, from state courts throughout the country, cases pending against alleged nondebtor joint tortfeasors.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties participated in proceedings in the Sixth Circuit: Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack (Petitioners herein); Office of the United States Trustee; California Plaintiffs' Steering Committee, *as amicus curiae;* Official Committee of Unsecured Creditors, as Intervenor.

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PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit issued on June 3, 1996, which reversed the holding of the United States District Court for the Eastern District of Michigan that the district court lacked subject matter jurisdiction under the Bankruptcy Code over thousands of state court tort claims pending against nondebtor defendants in courts across the country.

OPINIONS BELOW

The district court issued two opinions on September 12, 1995, that were the subject of Respondents' appeals to the Sixth Circuit: The first, addressing the debtor Dow Corning Corporation's motion to transfer claims pending against its corporate parents, Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning"), is reported at 187 B.R. 919. The second opinion, addressing motions by three unrelated Defendants, Baxter International Incorporated ("Baxter"), Minnesota Mining & Manufacturing Company ("3M"), and Bristol-Myers Squibb Company and Medical Engineering Corporation (together "Bristol Myers"), is reported at 187 B.R. 934. The Sixth Circuit reversed the district court in a decision issued on April 9, 1996. The decision, reported at 81 F.3d 635, was withdrawn in favor of an amended opinion issued on June 3, 1996, and reported at 86 F.3d 482 and is reprinted at 1a-30a; the accompanying order is reprinted at 31a-32a.

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[1] Petitioners are Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack. These Petitioners fully participated in the proceedings below. Counsel of record (John M. O'Quinn) presented oral argument on behalf of these Petitioners to the Sixth Circuit Court of Appeals with Marvin Frankel (counsel of record for Petitioner Official Committee of Tort Claimants) which has also filed Petition for Writ of Certiorari.

JURISDICTION

The decision of the Sixth Circuit reversing the decisions of the district court was issued on April 9, 1996. A timely petition for rehearing was filed on April 22, 1996, and denied on June 3, 1996, when the Sixth Circuit issued its amended opinion. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. §1254(1).[2]

STATUTES INVOLVED

Two statutory provisions are principally involved in this case.

1. 28 U.S.C. §1334(b), which in relevant part grants federal court jurisdiction over claims "related to" a debtor's bankruptcy, provides as follows:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

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[2] The current status of the actions subject to the court of appeals' amended opinion is that, upon its determination that the district court had jurisdiction over the tort claims pending against the nondebtor defendants, and therefore, power to transfer these claims pursuant to 28 U.S.C. §157(b)(5), the court of appeals remanded to the district court to consider the issue of abstention under 28 U.S.C. §1334(c). The district court promptly remanded most of the actions, pursuant to its mandatory and discretionary abstention powers under §1334(c). These Petitioners do not believe that the jurisdictional issues the subject of this petition are moot as there continues to be a live controversy over the district court's jurisdiction under 28 U.S.C. §1334(b) with regard to the nondebtor defendants as they have appealed to the Sixth Circuit from the district court's remand order. Even assuming, *arguendo,* that the jurisdictional issues are no longer technically extant as a result of the district court's remand, they are still "capable of repetition, yet evading review", and provide "a classic justification for a conclusion of nonmootness." *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

2. 28 U.S.C. §157(b)(5) provides:

> The district court shall order that personal injury, tort, and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

This petition provides the Court with an opportunity to delineate the boundaries of "related to" bankruptcy jurisdiction under 28 U.S.C. §1334(b), with regard to claims asserted by injured parties against defendants which are not in bankruptcy. The petition arises out of the silicone gel breast implant litigation, one of the largest mass tort litigations in history, and concerns the claims of thousands of women who have opted out of the class action settlement to pursue their individual claims against the manufacturers of these implants. *None of these manufacturers are in bankruptcy except Dow Corning Corporation,* ("Dow Corning" or "debtor"), which filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court for the Eastern District of Michigan, Northern Division, (Arthur J. Spector, J.), on May 15, 1995. Numerous claims remain pending in state and federal courts against parties not in bankruptcy which include Dow Chemical Corporation[3], Bristol-Myers Squibb Company, Medical Engineering Corporation, Baxter Healthcare Corporation, Baxter International Incorporated, and Minnesota Mining and Manufacturing Company, ("nondebtor defendants"). *No nondebtor defendant has ever asserted a contribution or indem-*

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[3]Dow Chemical and Corning, Inc. are the owners of Dow Corning. Dow Chemical participated in the development of the technology and in the testing and research performed on silicone which ultimately became the basis for the claim that silicone is biologically inert inside the human body.

nity claim against Dow Corning with the exception of Dow Chemical, one of the debtor's corporate parents.

The original $4.25 billion silicone gel breast implant global settlement, approved September 1, 1994, by the District Court for the Northern District Court of Alabama, Southern Division, (Samuel C. Pointer, Jr., CJ), resolved current and future claims against Dow Corning and numerous other manufacturers and sellers of silicone gel breast implants, ("the global settlement").[4] However, one year later, the global settlement collapsed, due to the fact that the total amount of current claims, (approximately 440,000), exceeded the amount of money set aside for such claims ($1.2 billion), and the parties were not successful in eliminating the need for reductions in the benefits payable under the global settlement's Disease Compensation Program.[5]

When the global settlement collapsed it was not decertified by the district court, but was instead "revised" and replaced with a Revised Settlement Program.[6] Many women have opted-out of the global settlement and the Revised Settlement Program to seek compensation in state courts, which they believe are in a better position to efficiently and expeditiously resolve their individual claims. Nondebtor defendants have sought to prevent the resolution of these cases at the local level by attempting to remove and transfer them to the bankruptcy court. The actions of the nondebtor defendants in the courts below is nothing less than a concerted nationwide attempt by solvent, nonbankrupt manufacturers and sellers of silicone gel breast implants to deprive these women of their day in state court by use and abuse of federal bankruptcy provisions.

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[4] *In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Heidi Lindsey, et al v. Dow Corning Corporation, et al,* 1994 WL 578353 at 23 (N.D. Ala. Sept. 1, 1994).

[5] *See In re Silicone Gel Breast Implant Prods. Liab. Litig.,* MDL 926, CV 92-P-10000-S (N.D. Ala. Oct. 7, 1995) (Order No. 26).

[6] MDL 926 Order No. 27, dated December 22, 1995.

In furtherance of that strategic objective, on June 12, 1995, Dow Corning filed a motion with the bankruptcy court, pursuant to 28 U.S.C. §157(b)(5), to transfer to the District Court for the Eastern District of Michigan all breast implant claims of women that had opted out of the breast implant settlement pending against it and its shareholders, Dow Chemical and Corning, Inc.[7] Dow Chemical and Corning, Inc. joined in the motion. On June 14, 1995, the nondebtor defendants also moved, pursuant to §157(b)(5), to transfer to the District Court for the Eastern District of Michigan those opt-out cases in which they had been named as defendants along with Dow Corning. These motions requested the district court to order that the personal injury and wrongful death claims against them be tried in the district court in which the bankruptcy is pending, i.e., the District Court for the Eastern District of Michigan. *The debtor, Dow Corning, did not join in any of the transfer motions filed by the nondebtor defendants.* The primary arguments asserted by the nondebtor defendants as a basis for assumption of bankruptcy "related to" jurisdiction over claims asserted against the nondebtors by tort claimants was the existence of contingent contribution or indemnity claims against the debtor by these nondebtors, even though none of the nondebtors (other than Dow Chemical) had ever asserted such a claim against the debtor.

On September 12, 1995, the district court, (Denise Page Hood, J.), issued two opinions and companion orders regarding the transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under 28 U.S.C. §1334(b) and permitted transfer pursuant to §157(b)(5). However, with respect to claims pending against all nondebtor defendants, the district court denied the motion to transfer on the basis that the claims were not "related to" Dow

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[7] The bankruptcy court had previously dismissed an adversary proceeding filed by Dow Corning seeking a temporary restraining order and preliminary injunction under §105 of the Bankruptcy Code barring opt-out Plaintiffs from proceeding to trial against its shareholders Dow Chemical and Corning.

Corning's bankruptcy, and the court did not have bankruptcy subject matter jurisdiction under 28 U.S.C. §1334(b).

In denying the transfer motions of the nondebtor defendants, the district court also (i) directed that individual federal courts nationwide dismiss or sever Dow Corning from claims asserted against Dow Corning and the nondebtor defendants, and remand the claims against the nondebtor defendants to state courts; and (ii) enjoined the nondebtor defendants from removing any other cases from state to federal court, pursuant to 28 U.S.C. §1452 where the only basis for such removal was 28 U.S.C. §1334(b) or 28 U.S.C. §1367(a).

In determining that it did not have subject matter jurisdiction over claims against nondebtor defendants, the district court relied upon the decisions in *Celotex Corp. v. Edwards,* ____ U.S. ____, 115 S.Ct. 1493, 1498-99 (1995); *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984); and *Robinson v. Michigan Consolidated Gas Co., Inc.,* 918 F.2d 579, 583-84 (6th Cir. 1990). Both *Celotex* and *Robinson* acknowledge that the test for determining "related to" bankruptcy jurisdiction under §1334(b) is that set forth in *Pacor*, construing 28 U.S.C. §1471(b), the identical predecessor to §1334(b).

Applying the *Pacor* test to the nondebtor defendants, the district court concluded that it did not have subject matter jurisdiction under §1334(b) in light of the absence of any judgment between plaintiffs and nondebtor defendants, and the absence of any contractual or automatic basis for indemnification between the nondebtors and Dow.[8] The district court also rejected the motions of nondebtor defendants on the grounds of judicial economy, stating that judicial economy alone does not justify the assumption of jurisdiction over non-bankruptcy actions

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[8] The district court correctly observed that: "In the instant case, as in *Pacor,* there would be no contingent claim by the non-debtors against the Debtor for indemnification until such time as a judgment is rendered. Even then, the non-debtors would have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor before the Bankruptcy Court." Memorandum Opinion and Order on the Nondebtor Motions to Transfer at 4.

involving the nondebtor defendants, (also citing *Pacor,* 743 F.2d at 994).

The court of appeals reversed, holding that the district court had subject matter jurisdiction over the opt-out cases sought to be transferred because they are "related to" Dow Corning's bankruptcy. The circuit court held that such jurisdiction existed with respect to claims against all the defendants because of the possibility that such parties might pursue claims for contribution in the debtor's bankruptcy, even though the court of appeals acknowledged that the nondebtors (with the exception of debtor's parent corporations) had *never* asserted a claim for contribution or indemnity against Dow Corning. 86 F.3d at 493-94.[9] The Sixth Circuit remanded the case for further consideration of the transfer motions under §157(b)(5), directing the district court to undertake an abstention analysis under §1334(c). *Id.* at 497.[10]

The Sixth Circuit also rejected the petitioner's argument that 28 U.S.C. §157(b)(5), the statute under which respondents sought a "transfer" of the nondebtor claims, does not speak of or provide for any such transfer. As against the textual language and legislative history as argued by petitioners, the decision stands as the first and only one permitting use of §157(b)(5) to effect a mass transfer of litigation against unrelated corporate tortfeasors in circumstances such as these.

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[9] The Sixth Circuit adverted to a second ground for "related to" jurisdiction, but only with respect to claims against Dow Chemical and Corning, the Debtor's corporate parents: the potential impact of nondebtor claims on insurance jointly held by the Debtor and its parents. 86 F.3d at 494-95. Since this ground could not be asserted as a basis for "related to" jurisdiction over claims against non-shareholder nondebtors, a reversal of the Sixth Circuit's judgment as to those parties would follow automatically from a determination by this Court that the prospect of contribution claims does not itself establish such jurisdiction. With respect to claims against the Debtor's corporate parents, we believe the appropriate disposition would then be reversal with a remand to determine whether the insurance factor alone is sufficient to establish "related to" jurisdiction over the claims asserted against Dow Chemical and Corning.

[10] The district court has now determined on remand, that both mandatory and permissive abstention apply to all claims asserted against the nondebtors (including Dow Chemical and Corning). The decision is being appealed by the nondebtors.

Thus, the court of appeals authorized subject matter "related to" jurisdiction over claims between plaintiffs and nondebtor defendants where there is only the remote possibility that those claims will ever have an effect on the debtor's estate. Such an unprecedented, broad sweeping interpretation of "related to" jurisdiction threatens to convert into a bankruptcy proceeding every lawsuit where there exists the possibility (however remote) that the debtor's estate might be impacted by the random side effects of the litigation between plaintiff and nondebtor defendants.

REASONS FOR GRANTING THE PETITION

This petition should be granted because there is a conflict amongst the circuits and the state of the law is now confusing and unclear.

1. The Court of Appeals' Interpretation and Application of 28 U.S.C. §1334(b) Conflicts With That of the Second, Third, Seventh and Eleventh Circuits.

Although purporting to follow the decision in *Pacor, supra,* which has been adopted in the majority of circuits, (*See Celotex Corporation v. Edwards, supra*), the Sixth Circuit has gone well beyond the boundaries of *Pacor* in authorizing "related to" bankruptcy jurisdiction in circumstances where the Third Circuit in *Pacor* expressly declined to do so, in the absence of a contractual guaranty or an agreement to indemnify provided by the debtor creating a mature claim for contribution or indemnity affecting the debtor's estate. 743 F.2d at 995.

The Sixth Circuit's decision is in conflict with that of the Second, Third, Seventh, and Eleventh Circuits, whose decisions indicate that "related to" jurisdiction would not exist in similar circumstances. As the Seventh Circuit stated in *In the Matter of Fedpak Systems, Inc.,* 80 F.3d 207, 213 (7th Cir. 1996):

> Whether Fedpak's seeking of a clarification order falls within the jurisdiction of the bankruptcy court depends in part upon how one interprets the "related to" language in 28 U.S.C. §§157(a) and 1334(b). The circuits are split on how best to interpret this statutory language .... Some courts have adopted a sweeping test which holds that whenever a proceeding "*could conceivably have any effect on the [bankruptcy] estate*," it is "related to" a case under title 11 and the bankruptcy court has jurisdiction. *See* e.g. *Pacor, Inc. v. Higgins* ... This circuit has articulated a more limited and, we believe, more helpful definition of the bankruptcy court's "related to" jurisdiction. Our precedents hold that "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e. the debtor's estate] or the allocation of property among creditors.' "

Id. at 213-14. (*emphasis added, citations omitted*).

See also: Second Circuit: *In re Turner,* 724 F.2d 338, 341 (2nd Cir. 1983) (referring to the "conceivable effect" test in *Pacor* but requiring that there be a "significant connection" with the bankruptcy); Third Circuit: *Pacor; supra,* 743 F.2d at 995, in which the mere existence of a potential third party claim for indemnity did not satisfy the "conceivable effect" and therefore did not justify "related to" bankruptcy jurisdiction under 28 U.S.C. §1471(b), the identical predecessor to 28 U.S.C. §1334(b); Seventh Circuit: *In re Memorial Estates, Inc.,* 950 F.2d 1364, 1368 (7th Cir. 1992), *cert. denied,* 504 U.S. 986, 112 S.Ct. 2969, 119 L.Ed. 2d 589 (1992); *In re Xonics Inc.,* 813 F.2d 127, 131 (7th Cir. 1987) ("related to" jurisdiction exists when a dispute affects the amount of property available for distribution or allocation among creditors); *Home Insurance Co. v. Cooper & Cooper, Ltd.,* 889 F.2d 746, 749 (7th Cir. 1989) (following *Xonics* and stating that "We have read §157(c) [relating to bankruptcy judge's function] narrowly not only out of respect for Article III but also to preserve the

jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy"); *In the Matter of Fedpak Systems, Inc., supra.,* following the foregoing Seventh Circuit authorities; Eleventh Circuit: *In re Lemco Gypsum, Inc.,* 910 F.2d 784 (11th Cir. 1990) (stating that "The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets, but it cannot be extended beyond its purpose," *Id.* at 789-90, and noting that the Second and Seventh Circuits, (and formerly the Sixth Circuit), have "related to" formulations that "may deny jurisdiction in cases where the dispute's probable effect on the debtor's estate, while conceivable, is nonetheless remote," citing *In re Turner* and *In re Xonics, Id.* at 788, n.19).

The Sixth Circuit's position also conflicts with *Celotex, supra,* in which this Court stated: "We also agree with that Court's observation that a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Supra,* 115 S.Ct. at 1499. *See Pacor, supra* at 994; *Board of Governors v. MCorp Financial,* 502 U.S. 32, 40, 112 S.Ct. 459, 464, 116 L.Ed.2d 358 (1991) (stating that Congress has "vested limited authority" in bankruptcy courts).

Although no circuit other than the Sixth Circuit has gone so far as to extend "related to" jurisdiction based on potential or unasserted claims for contribution, at least two circuits have adopted an expansive interpretation of §1334(b) that brings them into conflict with the approach adopted by the Third and Seventh Circuits, if not the Second and Eleventh Circuits as well. *See In re Wood,* 825 F.2d 90, 93-94 (5th Cir. 1987) (holding that subject matter jurisdiction existed on the ground that, "[a]lthough we acknowledge the possibility that this suit may ultimately have no effect on the bankruptcy, we cannot conclude . . . that it will have no *conceivable* effect." (*emphasis in original*)); *In re Fietz,* 852 F.2d 455, 457 (9th Cir. 1988) (stating that although other circuits "have adopted definitions similar to the one announced in *Pacor* . . . their formulations may deny jurisdiction in cases where the dispute is "conceivably" related to

the bankruptcy estate, but that relationship is remote . . . We reject any limitation on this definition . . .").

This disparity between these circuits is by no means a superficial or contrived "conflict" but is real, material and of profound consequence, particularly in the class action context and other multi-party litigation where the outcome of the jurisdictional question can subject a multitude of claims against nondebtors to bankruptcy jurisdiction. While the court of appeals purports to follow the "conceivable effect" test in *Pacor,* the outcome differential that now exists between it and certain other circuits is not simply one of minor degrees of separation based on distinguishable facts. There is now a fundamental divergence over when the federal courts may assume bankruptcy jurisdiction based on potential but non-ripe claims for contribution and indemnity, in litigation where there is at least one debtor, whether named as a defendant or not. Clearly, the Third and Seventh Circuits would not authorize jurisdiction in such circumstances, whereas the Sixth Circuit would. It also appears that the Second and Eleventh Circuits would not extend jurisdiction in similar circumstances.

In view of the jurisdictional and managerial implications for major multi-party litigation, this case provides a timely opportunity to provide guidance and promote uniformity as to when the federal courts may exercise bankruptcy jurisdiction over claims that lack any other basis for federal intervention.

2. The Decision of the Court of Appeals is Clearly Erroneous.

The court of appeals' decision is clearly erroneous, and that error will have serious consequences if perpetuated by the Sixth Circuit and followed in other circuits. The decision results in virtually limitless subject matter bankruptcy jurisdiction for the district courts in those circumstances where there is at least one bankrupt wrongdoer, whether named as a defendant or not.

(a) Sixth Circuit's Interpretation of 28 U.S.C. §1334(b) is Clearly Erroneous.

The court of appeal's decision is premised on the opinion that a finding of definite third party liability against a debtor is not a condition precedent to holding an action related to a bankruptcy proceeding, and that the existence of contingent claims, which could ripen into fixed claims, justifies "related to" jurisdiction. 86 F.3d at 490-494. In contrast, it is apparent from *Pacor* that a potential claim for indemnity or contribution does not support "related to" jurisdiction. In *Pacor,* the Third Circuit held that a potential third party claim for indemnity that the defendant asbestos seller might have against the bankrupt manufacturer of the product did not justify the assumption of "related to" jurisdiction. The decision in *Pacor* is important not only for its articulation of the test for determining "related to" jurisdiction but also in defining the boundaries of that jurisdiction.

The Third Circuit's reasoning applies with equal force in support of this petition: there are no judgments between plaintiffs and nondebtor defendants; there are no third party judgments between nondebtor defendants and Dow Corning; there are no contractual indemnity relationships between nondebtor defendants and Dow Corning. In short, there is no nexus between the nondebtor defendants and the debtor's estate sufficient to justify "related to" jurisdiction over the breast implant claims against the nondebtor defendants.

The prospect of "related to" jurisdiction even in circumstances where there is a debtor tortfeasor that is not named as a defendant but can be jointly and severally liable with other named tortfeasors is particularly disturbing. Although the statutes of some jurisdictions limit contribution to those against whom judgments have been rendered, fixing both liability and amount, others do not. *Prosser & Keeton on the Law of Torts,* Section 50 at 338-39 (5th ed. 1984); *Restatement (Second) of Torts,* Section 886(A), articulating principles governing contribution among tortfeasors. (As Comment b. to Section 886(A)(1)

states, "It is not necessary that [tortfeasors] act in concert or in pursuance of a common design, nor is it necessary that they be joined as defendants.") Moreover, "It is beyond peradventure that joint tortfeasors are not indispensable parties in the federal forum." *Lynch v. Johns-Manville Sales Corporation,* 710 F.2d 1194, 1198 (6th Cir. 1983). Thus, in a suit in which a debtor tortfeasor is not named but may nevertheless be jointly and severally liable for all of the plaintiff's damages, or only a portion thereof, (for example, economic damages in cases of personal injury, property damage, or wrongful death, as under Cal. Civ. Code §§1431 and 1431.2), a potential (and even unasserted) claim for contribution against an unnamed debtor tortfeasor would invoke "related to" jurisdiction under the Sixth Circuit's decision.

The Sixth Circuit has created a future scenario for manipulation and abuse of the Bankruptcy Code to benefit nondebtors to the detriment of both the bankrupt debtor and tort claimants. This Sixth Circuit decision creates bankruptcy "related to" jurisdiction based on nothing more than the existence of joint and several liability allegations in a lawsuit. Nondebtors may now seek bankruptcy transfer by virtue of the filing of bankruptcy by any defendant alleged to be jointly and severally liable on the basis of nothing more than the potential for contingent contribution claims against the debtor. Co-defendants may now collude to "sacrifice" a defendant to bankruptcy in order to obtain transfer of all claims asserted against the non-bankrupt parties.

To the extent that the court of appeals is concerned with the protection of the assets of the bankrupt's estate, the automatic stay provisions of §362(a) of the Bankruptcy Code, 11 U.S.C. §362(a), enables the bankruptcy court to effectively protect these assets, and to promote an orderly reorganization or liquidation of the debtor's estate.

However, the Sixth Circuit's decision is inconsistent with many decisions which have repeatedly held that bankruptcy courts should not exercise jurisdiction over claims against nondebtors by extension of the automatic stay provisions of the

Bankruptcy Code, 11 U.S.C. §362. *See Lynch v. Johns-Manville Sales Corporation,* 710 F.2d 1194, 1197 (6th Cir. 1983); *Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1330 (10th Cir. 1984); *Teachers Insurance & Annuity Association of America v. Butler,* 803 F.2d 61, 65 (2nd Cir. 1986); *Maritime Electric Co., Inc. v. United Jersey Bank,* 959 F.2d 1194, 1205 (3rd Cir. 1991) (referring to numerous authorities).

Only in unusual situations will a stay under §362(a)(1) be extended to a nondebtor defendant, for example, where a judgment against a solvent defendant would effectively constitute a judgment or finding against a debtor as a result of the debtor's contractual or statutory obligation to indemnify the nondebtor defendant, and even then an arguably unusual situation may not be recognized as grounds for extending the stay. *See A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 999-1001 (4th Cir. 1986), *cert. denied,* 479 U.S. 876 (1986) (recognizing "unusual situation" exception); *In the Matter of Lockard,* 884 F.2d 1171, 1179 (9th Cir. 1989) (declining to recognize "unusual situation" exception.)

This recognition of the need for limitations on bankruptcy jurisdiction within the context of 11 U.S.C. §362(a) in order to strike a careful balance between the rights of plaintiffs, the obligations of solvent defendants, and the protection of debtor defendants, is equally relevant to the application of "related to" jurisdiction under 28 U.S.C. §1334(b).[11]

The inevitable consequence of the court of appeals' wholesale extension of jurisdiction was perhaps best described by the bankruptcy court in *In re American Energy, Inc.,* 50 B.R. 175, 179 (Bankr. N.D. 1985). The court's observations are as apposite

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[11] In *A.H. Robbins, supra,* 743 F.2d at 995, the court, in considering the application of the stay provisions of 11 U.S.C. §362(a)(1), referred to the jurisdictional limitations of 28 U.S.C. §1334(b) recognized in *Pacor.*

today as they were when made with reference to the former §1471(b):

> Giving a very broad definition to the term ["related"] would transform every state-created cause of action into a federal matter merely because a debtor were involved, *but this would be a jurisdictionally infirm construction.* . . . This Court has taken the position in related proceedings based solely on state created contract law that the clear expression of both the United States Supreme Court and Congress cannot be ignored. . . . Such cases, although tangentially related to a pending bankruptcy proceeding, are not sufficiently related to the proceeding to confer jurisdiction on the bankruptcy court under 28 U.S.C. §157(c)(1) unless there also exists an independent basis for federal jurisdiction.

Id. at 179. *(emphasis added; citations omitted)*

Or, as the court explained in *In the Matter of Fedpak Systems, Inc.*, "We have interpreted 'related to' jurisdiction narrowly 'out of respect for Article III' . . . as well as to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts . . . *Additionally, we believe that common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else.'* Gerald T. Dunne, *The Bottomless Pit of Bankruptcy Jurisdiction,* 112 Banking L.J. 957 (Nov.-Dec. 1995) . . . 'A court cannot write its own jurisdictional ticket. *Zerand-Bernal* at 164.' *supra,* 80 F.3d at 214-15 *(emphasis added)*[12].[12] *See also New York State Conference of Blue Cross v. Travelers Insurance,* ____ U.S. ____ 115 S.Ct. 1671, 1677 (1995) (recognizing that if the term "related to" was taken to extend to the furthest stretch of its indeterminacy, same would never run its course because relations stop nowhere).

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[12]Referring to *Zerand-Bernal Group, Inc. v. Cox,* 23 F.3d 159 (7th Cir. 1994).

Moreover, while it may well be that Congress intended a broad jurisdictional grant under §1334(b), it could not have intended the wholesale transfer of authority that results from the court of appeals' decision in this case. In their legislative debate that accompanied the 1984 Bill, both Senators Dole and Hatch emphasized that the legislation was not intended to drastically interfere with state proceedings. *See* 130 Cong. Rec. 8891, 8896, 8889 (June 29, 1984) (Statement of Sens. Dole and Hatch). Senator Dole's comments are cited in *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991), and Senator Hatch's comments are cited in *Mattingly v. Newport Offshore, Ltd.*, 57 B.R. 797 (D.Rh.I. 1986) in which the court observed that: "The legislative history of the [1984 Act], which gave birth to the bewildering array of statutes here at issue, adequately *evinces an abiding concern for continuing to allow state courts to interpret state law" Id.* at 799. *(emphasis added)*. While this is accomplished to some extent by the abstention powers under 28 U.S.C. §1334(c), *see In re White Motor Credit,* 761 F.2d 270, 273 (6th Cir. 1985) (quoting Senator Dole), it is nevertheless apparent from the overall tenor of the debates that while the extent of the jurisdictional grant under §1334(b) should be broad, it was not intended to be a takeover of state court jurisdiction of virtually limitless proportions, as *Celotex, supra,* 115 S.Ct. at 1499, makes clear.

Even with the provisions for abstention under 28 U.S.C. §1334(c), the Sixth Circuit's overly expansive reading of §1334(b) conflicts with the policies and principles of federalism and comity underlying the relationship between the federal and state courts. *See Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

The basic prerequisites for bankruptcy subject matter jurisdiction under 28 U.S.C. §1334(b) are not present in those claims against the nondebtor defendants, which are the subject of this petition, and many other opt out breast implant cases that do not involve or implicate Dow Corning and cannot conceivably impact its reorganization. Unasserted potential claims for contribution

and indemnity do not justify assumption of "related to" jurisdiction under §1334(b). These cases should be left alone for expeditious resolution in the state courts from whence they came and to which they should be remanded, preserving the bankruptcy jurisdiction of the district courts for cases in which there is a demonstrated, not hypothetical, effect on the estates in bankruptcy. As this Court noted in *Celotex,* the bankruptcy court has no jurisdiction over proceedings that have no effect on the debtor.

It is, therefore, wholly propitious for this Court to intervene in order to ensure that the exercise of power under §1334(b) does not produce the limitless jurisdiction warned against in *Pacor* and echoed by this Court in *Celotex.*

(b) Sixth Circuit's Interpretation of 28 U.S.C. §157(b)(5) is Clearly Erroneous.

An independent ground for granting the petition is the Sixth Circuit's holding that 28 U.S.C. §157(b)(5) empowers the district court to order transfer of any "related to" case from anywhere in the country to the district court in the bankruptcy venue. The Sixth Circuit's holding constitutes a plain misreading of the statute that, combined with its expansive reading of "related to" jurisdiction, threatens to undermine the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy and grant to nondebtor parties unprecedented bankruptcy protection without imposing any of the burdens associated with seeking such relief.

The starting point for analysis is, of course, the language of §157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The most striking thing about that provision is that the word "transfer" is nowhere to be found in it. The meaning of that plain omission for the nondebtors is that they have no basis in law for the transfers they sought.

Section 157(b)(5) is a venue-setting provision for personal injury tort cases *against the debtor.* This becomes clear from the setting of this provision within §157 as a whole, which deals generally with the division of responsibility between the district and bankruptcy courts. Literally, of course, when §157(b)(5) refers to "personal injury and wrongful death claims" without qualification, it could mean such claims against anyone, anywhere. But it obviously does not mean that. It means non-core proceedings triable by the district court, not the bankruptcy court. *See In re United States Lines,* 128 B.R. 339, 341 (S.D.N.Y 1991). What kind of non-core proceedings? Section 157(b)(2)(B) answers this question: "personal injury tort or wrongful death claims *against the estate." (emphasis added).*

The looser conception of §157(b)(5) has crept into some cases because "transfer" is a perfectly sensible word to apply to the power over cases in which *the debtor* is a defendant. Such cases are automatically *in* bankruptcy court in the fundamental sense that they are held in place by that court by virtue of the automatic stay imposed by Bankruptcy Code §362(a). For those cases, the bankruptcy district court is empowered to say whether they may be tried at all so long as the bankruptcy is pending. It is a rational corollary to grant the power to say *where* they may be tried. In that orderly scheme of things, it is suitable to speak of the venue-setting power of the district court as a power of "transfer." But the notion of a wider power over cases between nondebtors is embraced neither by the statutory language nor by the essential scheme of the relevant Code provisions.

As against the sound understanding that §157(b)(5) refers to "claims against a [bankrupt] estate," the extraordinary power to transfer nondebtor cases from courts throughout the country, both state and federal, is a kind of sweeping authority that would require the most persuasively explicit statutory language. When

Congress meant to provide for transfer only of cases pending in *federal courts,* and then only for purposes of *pretrial handling,* it created a special multi-judge tribunal for the purpose. 28 U.S.C. §1407. There is no persuasive suggestion anywhere that Congress intended to grant the headier power the Respondents claim — to pluck cases out of state and federal courts pending against nondebtors — to any single district judge in bankruptcy cases.

The contrary view pressed by Respondents and adopted by the Sixth Circuit has its judicial origin and principal support in *A.H. Robins Co. v. Piccinin,* 788 F.2d 994 (4th Cir.), *cert. denied,* 479 U.S. 876 (1986), which turns out upon close inspection to be strange authority indeed, notably because no transfer of claims against nondebtors — or even claims against debtor — ultimately was ever authorized or made in that case. It is true that Judge Mehrige ordered transfer there of "related to" cases, but his order to that effect was remanded because the affected parties had not received necessary notice of the proposed transfers. *Id.* at 1015-16. On remand, that notice was never given; the transfers never happened; and the Robins reorganization went forward to completion unimpeded. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991).

Moreover, the Fourth Circuit's discussion of the transfer issue proceeds entirely upon consideration relating to suits *against the debtor* and does not opine at all about the subject of possible "related" cases against nondebtors. The Fourth Circuit's analysis repeatedly refers to "tort cases against a Chapter 11 debtor" (788 F.2d at 110); transfer of venue "of a case against the bankrupt to another district" (*Id.* at 1016), strongly suggesting that the court simply never focused on the question whether §157(b)(5) was intended to permit transfer of nondebtor claims.

The Sixth Circuit relied heavily on statements in *Robins* that claims against A.H. Robins could not be estimated or a dispute resolution facility established unless all Dalkon Shield claims were physically consolidated in one forum. 86 F.3d at 496-97. But it is undisputed that (1) no cases were ever actually transferred in the *Robins* bankruptcy and (2) the lack of such a transfer had

not a whit of impact on the district court's ability to estimate the value of the Dalkon Shield claims and resolve the bankruptcy by establishing a claims resolution facility. Thus, to the extent the Fourth Circuit in Robins spoke in terms that would stretch the boundaries of §157(b)(5) to achieve a policy goal, it has since become clear that the attainment of that goal is unrelated to any purported need to transfer cases. Estimation and liquidation of pending tort claims are two different things, and only the former need occur in the centralized bankruptcy forum. Even more clearly, it is wholly unnecessary to have claims against *nondebtors* transferred.

In short, the correct reading of 28 U.S.C. §157(b)(5) is a further question of moment adding measurably to the reasons for granting the writ.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, McANINCH & LAMINACK

November 8, 1996

A. :OMMENDED FOR FULL-TEXT F LICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1996 FED App. 0154A (6th Cir.)
File Name: 96a0154a.06

Nos. 95-2034/2082/2084/2106/2107

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, et al.; OFFICIAL COMMITTEE OF TORT CLAIMANTS, et al.,

Plaintiffs-Appellees,

v.

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTH CARE PROVIDERS OF CONNECTICUT, et al.,

Defendants,

DOW CORNING CORPORATION; THE DOW CHEMICAL COMPANY (95-2034/2107); CORNING INC. (95-2107); BAXTER HEALTHCARE CORPORATION; BAXTER INTERNATIONAL INC. (95-2082); MINNESOTA MINING AND MANUFACTURING CO. (95-2084); BRISTOL-MYERS SQUIBB CO.; MEDICAL ENGINEERING CORPORATION (95-2106),

Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed April 9, 1996

AMENDED OPINION

Before: MARTIN and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. This is an appeal to determine the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings "related to" a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending. The principal issue presented is whether the district court erred, as a matter of law, in its determination that claims for compensatory and punitive damages asserted in tens of thousands of actions against numerous nondebtor manufacturers and suppliers of silicone gel breast implants could have no conceivable effect upon, and therefore were not related to, the bankruptcy estate of The Dow Corning Corporation. The district court held that it did not have "related to" jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b) and concluded that they could not be transferred to it pursuant to 28 U.S.C. § 157(b)(5). For the following reasons, we **REVERSE** and **REMAND** for further proceedings consistent with this opinion.[1]

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

[1]In this amended opinion, we adhere to our April 9, 1996 decision in this case, but seek to clarify the scope of our ruling and the impact we intend it to have. The opinion is therefore amended and reissued as follows.

I.

Until it ceased their manufacture in 1992, Dow Corning was the predominant producer of silicone gel breast implants, accounting for nearly 50% of the entire market. In addition, Dow Corning supplied silicone raw materials to other manufacturers of silicone gel breast implants. In recent years, tens of thousands of implant recipients have sued Dow Corning, claiming to have been injured by autoimmune reactions to the silicone in their implants. Dow Chemical Company, Corning Incorporated, Minnesota Mining and Manufacturing Company, Baxter Healthcare Corporation and Baxter International Incorporated,[2] and Bristol-Myers Squibb Company and Medical Engineering Corporation[3] are other manufacturers and suppliers of silicone gel-filled implants, and are codefendants with Dow Corning in a large number of personal injury actions.

On June 25, 1992, prior to Dow Corning's filing of its Chapter 11 petition, the Federal Judicial Panel on Multidistrict Litigation ordered the consolidation of all breast implant actions pending in federal courts for coordinated pretrial proceedings, and transferred those actions to Chief Judge Pointer of the Northern District of Alabama. On September 1, 1994, Chief Judge Pointer certified a class for settlement purposes only, and approved a complex agreement between members of the class and certain defendants that contemplated the creation of a $4.25 billion fund to cover, among other things, the costs of treatment and other expenses incurred by breast implant recipients. Each class member was given the opportunity to opt out of the class and to pursue her individual claims

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[2] Baxter never designed, manufactured, or marketed breast implants, but is a defendant in personal injury actions as a result of certain corporate acquisitions and mergers. The Baxter implants were actually made by The Heyer-Schulte Company.

[3] The Bristol-Myers Squibb implants were made by a subsidiary, The Medical Engineering Corporation.

separately. Several thousand plaintiffs opted out of the settlement class, while approximately 440,000 elected to register for inclusion in the Global Settlement.[4]

Due to the litigation burden imposed by what is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, Dow Corning filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995, in the United States District Court for the Eastern District of Michigan. The district court had jurisdiction over that proceeding pursuant to 28 U.S.C. § 1334(a). As a result of Dow Corning's Chapter 11 filing, all breast implant claims against it were automatically stayed pursuant to 11 U.S.C. § 362(a). Claims against Dow Corning's two shareholders, Dow Chemical and Corning Incorporated, and the other nondebtor defendants were not stayed. Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb subsequently removed many opt-out claims in which those companies were named defendants with Dow Corning from state to federal court pursuant to 28 U.S.C. § 1452(a).

On June 12, 1995, Dow Corning filed a motion pursuant to 28 U.S.C. § 157(b)(5)[5] to transfer to the Eastern District

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[4]It has since become clear that the original Global Settlement will not hold together because the sums provided are inadequate to fund the claims filed by over 100,000 plaintiffs. Unless a modified settlement is reached, thousands of opt-in plaintiffs and thousands of claimants who have yet to file actions are likely to file or reactivate individual suits against the breast implant defendants in both state and federal courts.

[5]Title 28 U.S.C. § 157(b)(5) states: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

of Michigan opt-out breast implant claims pending against it and its shareholders, Dow Chemical and Corning Incorporated.[6] Dow Corning's motion covered claims that had been removed to federal court and were pending in the multidistrict forum, as well as claims pending in state courts which were in the process of being removed to federal courts pursuant to 28 U.S.C. § 1452(a). Dow Corning envisioned its transfer motion as the first step in ensuring a feasible plan of reorganization, and indicated that it would seek to have the transferred actions consolidated for a threshold jury trial on the issue of whether silicone gel breast implants cause the diseases claimed. Dow Chemical and Corning Incorporated joined in Dow Corning's motion.

On June 14, 1995, Minnesota Mining, Baxter, and Bristol-Myers Squibb also moved, pursuant to Section 157(b)(5), to transfer to the Eastern District of Michigan the opt-out cases in which those manufacturers were named as defendants with Dow Corning.[7] In their Section

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[6]Dow Corning's motion sought a transfer of lawsuits against it and its shareholders which were not part of the global settlement. Dow Corning, Dow Chemical and Corning have stated that "[t]housands of the suits against Dow Corning have included claims against Dow Chemical and Corning, even though neither of those companies designed, manufactured, tested, or sold breast implants." Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 9. The companies have explained that "[p]laintiffs have generally alleged that the Shareholders are liable for Dow Corning's acts because they purportedly (1) negligently undertook Dow Corning's duties in connection with Dow Corning's products, (2) aided and abetted Dow Corning's manufacture and sale of unsafe products, or (3) conspired with Dow Corning in the sale by Dow Corning of unsafe or inadequately tested products." *Id.* at 9-10. Dow Corning's transfer motion covered about one-third of the breast implant claims brought by opt-out plaintiffs against Dow Corning.

[7]The Minnesota Mining, Baxter, and Bristol-Myers Squibb motions were limited to personal injury actions in which Dow Corning was a named codefendant with one or more of those parties and the plaintiffs had opted out of the Global Settlement. According to Minnesota

157(b)(5) motions, Minnesota Mining, Baxter, and Bristol-Myers Squibb also asked the district court to order that the claims at issue be transferred to the district court in which the bankruptcy case is pending so that the court could conduct a consolidated trial on the issue of causation.

On September 12, 1995, the district court issued two opinions and companion orders regarding the Section 157(b)(5) transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under Section 1334(b) and permitted transfer pursuant to Section 157(b)(5). The district court, however, denied the remainder of the transfer motions on the ground that, as a matter of law, it lacked subject matter jurisdiction over the claims sought to be transferred because they were not "related to" Dow Corning's bankruptcy proceeding pursuant to 28 U.S.C.

Mining, "when [Dow Corning] filed for chapter 11, [it] was a codefendant with [Minnesota Mining] in approximately 75% of implant cases against [Minnesota Mining] . . . [i]n virtually every case, plaintiffs asserted claims of joint and several liability against [Minnesota Mining] and [Dow Corning] for the full amount of their asserted damages. Additionally, approximately 60% of the cases against [Minnesota Mining] involved plaintiffs who had received multiple sets of breast implants, in separate operations, including implants made by [Minnesota Mining] and at least one other manufacturer, which in most cases included [Dow Corning]." Brief for Minnesota Mining and Manufacturing Company at 6. The Baxter motion "covered personal injury actions in which both the Debtor and Baxter were named defendants and the plaintiff had opted out of the Global Settlement." Brief for Baxter Healthcare Corporation and Baxter International Inc. at 3. Baxter has stated that the actions in which "both the Debtor and Baxter are defendants number more than 5,000 . . . in most of which the Debtor and Baxter are alleged to be joint tortfeasors and jointly and severally liable for the damages asserted." *Id.* at 9. Bristol-Myers Squibb's motion explained that the company sought to have the district court transfer the opt-out cases in which it was a named codefendant with Dow Corning. Brief for Bristol-Myers Squibb Company and Medical Engineering Corporation at 5. The Minnesota Mining, Baxter, and Bristol-Myers Squibb motions covered approximately two-thirds of the breast implant claims asserted by opt-out plaintiffs against Dow Corning.

§ 1334(b). In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/or remand the combined opt-out actions to state court, and enjoined the nondebtor codefendants from removing any other cases from state to federal court pursuant to 28 U.S.C. § 1452 if the only basis for such removal was 28 U.S.C. § 1334(b) or 28 U.S.C. § 1367(a). In a September 14, 1995 order, the district court extended its rulings to include opt-in breast implant claims.

Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb subsequently filed appeals seeking review of the district court's partial denial of their motions to transfer. Those appeals were consolidated on October 10, 1995, and we are now faced with a complex set of questions pertaining to the scope of a district court's jurisdiction when it sits in bankruptcy, and its power to fix venue for the trial of wrongful death and personal injury tort claims that are "related to" a bankruptcy proceeding. In addressing these issues, we begin, as we do in any case involving a question of statutory construction, with the express language of the statute at issue and an examination of Congressional intent. In addition, we recognize that our decision will significantly impact the future course of this massive litigation. Realizing that we cannot satisfy all competing interests perfectly, our primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible. In seeking to achieve that goal, we are called upon to balance four different, and frequently competing, interests: those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.

II.

As a threshold matter, we must determine whether the district court's partial denial of the motions to transfer is immediately appealable. These issues are certainly fluid. Our general jurisdiction to review a decision or order of a district court sitting in bankruptcy is governed by 28 U.S.C. § 1291. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1985), *cert. denied*, 479 U.S. 876 (1986) ("*A.H. Robins Co. I*"); *In re Salem Mortgage Co.*, 783 F.2d 626, 629 n.15 (6th Cir. 1986) (stating that Congress apparently assumed Section 1291 would be available for bankruptcy appeals because that provision was at one time proposed to be the exclusive source of such jurisdiction). Title 28 U.S.C. § 1291 permits appeals only from "final decisions of the district courts." This finality requirement is considered "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Cottrell*, 876 F.2d 540, 541-42 (6th Cir. 1989) (citing *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir. 1985)). In bankruptcy cases, "a 'functional' and 'practical' application [of Section 1291] is to be the rule." *A.H. Robins Co. I*, 788 F.2d at 1009. The reason for a more relaxed rule of appealability in bankruptcy cases is that:

> Bankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.

Id. at 1009 (citations omitted). Therefore, where an order in a bankruptcy case "finally dispose[s] of discrete disputes within the larger case," it may be appealed immediately. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983). We find that the district court's order entered in bankruptcy satisfies the finality requirement of Section 1291 for purposes of appealability.

We also believe appealability of the district court's order is sustainable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Cohen* holds that it is not always necessary that a judgment terminate an action before an appeal may be brought, and permits appellate review of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. A collateral order is reviewable under *Cohen* when it: (1) conclusively determines the disputed question; (2) resolves an important question completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 988 (3d Cir. 1984) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). These three factors are equally fluid and are applied flexibly in determining whether an order involving a bankruptcy proceeding is reviewable. *In re Pan Am Corp.*, 16 F.3d 513, 515 (2d Cir. 1994) ("*In re Pan Am Corp. I*"). Here we believe these conditions have been satisfied on all grounds. The district court's order conclusively determines that claims pending against the nondebtor defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Because appellate jurisdiction exists, we turn to the questions on appeal.

III.

The first issue to be resolved is whether the district court has subject matter jurisdiction over breast implant claims pending not only against the debtor, Dow Corning, but also over certain claims pending against the nondebtor defendants. The nondebtor defendants argue that such jurisdiction exists pursuant to 28 U.S.C. § 1334(b) or, alternatively, 28 U.S.C. § 1367(a). We review the district court's jurisdictional ruling *de novo*. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir. 1991) (citation omitted).

Section 1334 grants jurisdiction to district courts in bankruptcy cases and proceedings as follows:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to cases under title 11*.

28 U.S.C. § 1334 (emphasis added).

In addressing the extent of a district court's bankruptcy jurisdiction under Section 1334(b) over civil proceedings "related to" cases under title 11, we start with the premise that the "emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases." *In re Salem*, 783 F.2d at 634. Although "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement" of Section 1334(b), *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990), Congressional intent was

"to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995) (citations omitted).

The definition of a "related" proceeding under Section 1334(b) was first articulated by the Third Circuit in *Pacor*. As stated in that case, the "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for "related to" jurisdiction. *Id.* However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section [1334(b)]." *Id.* (stating also that "[j]udicial economy itself does not justify federal jurisdiction"). Instead, "there must be some nexus between the 'related' civil proceeding and the title 11 case." *Id.*

Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 (noting in doing so that circuit courts have "uniformly adopted an expansive definition of a related proceeding under section 1334(b)"). The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 and n. 19 (11th Cir. 1990); *In re Feitz*, 852 F.2d 455, 457 (9th Cir. 1988); *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786

(8th Cir. 1987); *A.H. Robins Co. I*, 788 F.2d at 1002 n.11. According to the Supreme Court, the Second and Seventh Circuits have adopted slightly different tests for determining whether Section 1334(b) jurisdiction exists. *Celotex*, 115 S. Ct. at 1499 n.6 (citing *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1103 (7th Cir. 1991), *cert. denied* 503 U.S. 971 (1992) and *In re Turner*, 724 F.2d 338, 341 (2d Cir. 1983)).

In addition, the Supreme Court recently cited *Pacor* with approval in addressing the broad scope of the jurisdictional grant in Section 1334(b). The Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in [Section] 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of [Section] 1334(b) must be read to give district courts (and bankruptcy courts under [Section] 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex, 115 S. Ct. at 1498-99 (citations omitted) (recognizing at the same time that a bankruptcy court's jurisdiction cannot be limitless). The Court also stated that proceedings "related to" a bankruptcy proceeding include "suits between third parties which have an effect on the bankruptcy estate." *Id.* at 1499 n.5 (citing 1 Collier on Bankruptcy ¶ 3.01[1][c][iv], pp. 3-28 (15th ed. 1994)). With these standards in mind, we turn to an examination of whether subject matter jurisdiction exists pursuant to

Section 1334(b) over joint claims pending against Dow Corning and the various nondebtor defendants.

In their briefs and at oral argument, Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb proposed several theories for the existence of Section 1334(b) subject matter jurisdiction over certain breast implant claims pending against the nondebtor defendants, no one of which has been clearly determined to definitively confer "related to" jurisdiction under Section 1334(b). Specifically, the defendants argued that contingent claims for contribution and indemnification, jointly-held insurance policies,[8] the possibility of collateral estoppel with a corresponding increased exposure to liability, and the burden of defending against the overwhelming number of breast implant claims all give rise to the possibility that the Dow Corning estate will be seriously impacted if the claims at issue, all of which to some degree affect the reorganization of Dow Corning under Chapter 11, are permitted to proceed in separate forums nationwide. We believe two of these theories support a finding that the district court has "related to" jurisdiction over the claims at issue, and address them in turn.[9]

1. Claims for Contribution and Indemnification

Dow Corning, Dow Chemical and Corning Incorporated argue that the district court erred in its determination that "related to" jurisdiction does not exist over certain breast

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[8] Dow Chemical and Corning Incorporated are co-insured with Dow Corning under various liability policies.

[9] In our original opinion, we addressed the two additional arguments proffered by the movants in support of their assertion that "related to" jurisdiction exists over claims pending against Dow Corning and the nondebtor defendants. Upon reconsideration, we believe our finding that "related to" jurisdiction exists is best supported by the contribution and indemnification and joint insurance theories.

implant claims asserted against Dow Chemical and Corning Incorporated because, in addition to the claims asserted by the personal injury claimants, Dow Chemical and Corning Incorporated have asserted cross-claims against each other and Dow Corning in the underlying litigation, which will have an effect on the bankruptcy estate.[10] Minnesota Mining, Baxter, and Bristol-Myers Squibb argue that, despite the fact that they have not yet filed contribution and indemnification claims or proofs of claim relating to implant litigation in Dow Corning's bankruptcy case, they have contingent claims for contribution and indemnification that will have a conceivable effect on the bankruptcy proceedings. Minnesota Mining, Baxter, and Bristol-Myers Squibb therefore argue that the breast implant claims covered by their Section 157(b)(5) motions will give rise to thousands of claims against Dow Corning for indemnification and contribution. In addition, the nondebtor defendants claim that Dow Corning may itself have claims against them for contribution and indemnification under theories of joint and several liability. The companies argue that these claims need to be resolved as part of Dow Corning's bankruptcy proceedings and reorganization plan, and certainly will affect the debtor's rights, liabilities, options, and freedom of action in the administration of its estate.

Relying on *Pacor*, the district court rejected this basis for "related to" jurisdiction and held that the possibility of contribution or indemnification should only be regarded as relevant if and when judgments are actually entered against the nondebtors. The district court stated:

> In the instant case, as in *Pacor*, there will be no contingent claim by the Shareholders against the debtor

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[10] According to Dow Corning, Dow Chemical, and Corning Incorporated, the shareholders have asserted "thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant suits." (Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 21).

> for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502.

Pacor involved John and Louise Higgins' claim against the Philadelphia Asbestos Co. (Pacor) in state court seeking damages allegedly caused by Mr. Higgins' work-related exposure to asbestos supplied by the company. In response, Pacor filed a third-party complaint impleading the Johns-Manville Corporation, which Pacor claimed was the original manufacturer of the asbestos. After Johns-Manville filed for Chapter 11, a dispute ensued as to whether the Higgins-Pacor action was "related to" the Manville bankruptcy so that the entire controversy could be removed to bankruptcy court. The Third Circuit held that the primary Higgins-Pacor action would not affect the Manville bankruptcy estate, and therefore was not "related to" the bankruptcy proceedings. The court stated that the Higgins-Pacor action was, "[a]t best, a mere precursor to the potential third party claim for indemnification by Pacor against Manville," and held that, because all issues with regard to Manville's possible liability would be resolved in a subsequent third party impleader action, "there would be no automatic creation of liability against Manville on account of a judgment against Pacor." *Pacor*, 743 F.2d at 995 (stating also that "[t]here would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim"). Thus, the court in *Pacor* viewed the absence of "automatic" liability on the part of the debtor as dispositive in determining that Section 1334(b) "related to" jurisdiction did not exist.

It has become clear following *Pacor* that "automatic" liability is not necessarily a prerequisite for a finding of "related to" jurisdiction. The Third Circuit itself has emphasized that:

> A key word in [the] test is "conceivable." Certainty, or even likelihood, is not a requirement. Bankruptcy

> jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 264 (3d Cir. 1991) (citation omitted).

Our Circuit has held that Section 1334(b) "does not require a finding of definite liability of [an] estate as a condition precedent to holding an action related to a bankruptcy proceeding." *In re Salem*, 783 F.2d at 635. In *In re Salem*, our Court reversed a district court's determination that it lacked Section 1334(b) subject matter jurisdiction over a proposed settlement order entered by the bankruptcy court. Prior to bankruptcy, Salem Mortgage Company and related debtor and nondebtor corporations acted as mortgage brokers. Salem and three related corporations filed voluntary petitions under Chapter 11 and the bankruptcy court ordered the petitions of the four debtors consolidated for administration. The Michigan Attorney General subsequently filed an adversary proceeding against the debtors and eight other defendants. The major parties in interest negotiated a stipulation for temporary class certification and a proposed final consent judgment, which was conditionally approved by the bankruptcy court. The bankruptcy court eventually entered a Proposed Order Approving Class Certification, Settlement of Class Action Litigation, and Entry of Consent Judgment. While reviewing the proposed order, the district court raised the question of whether it possessed "related to" subject matter jurisdiction over the adversary proceeding, and concluded it did not. Our Court reversed that determination stating:

> The proposed order in this case provided that the plaintiff classes would release all claims against the debtors arising from the mortgage transactions except for claims concerning the alleged misappropriation of escrow funds. The order also provided that the debtors pay civil penalties under the Michigan

> Consumer Protection Act. The corporations' penalties are to be subordinated to the claims of the general creditors. Resolution of the dispute, moreover, will affect the liability of the debtors to the investors. For example, to the extent the value of the mortgages is reduced by their reformation, the investors may have an action against the debtors such as breach of the assignment agreement. Because of the nature of these mortgage transactions, we hold that this dispute is sufficiently related to the estate of the bankrupt such that the district court had jurisdiction over the subject matter.

Id. at 634. The Court stated that the case was distinguishable from *Pacor* on the ground that a finding of definite liability of an estate is not a prerequisite to holding an action "related to" a bankruptcy proceeding, and because the parties in the mortgage transactions in the proceeding at issue were "more intertwined" than the parties in *Pacor*. *Id.* at 635.

This Court's decision in *In re Salem* has been cited for the proposition that "when [a] plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *In re Wood*, 825 F.2d at 94 (citing *In re Salem*, 783 F.2d at 634). *In re Wood* involved a dispute among the directors/stockholders of a medical clinic. Dr. Arthur Wood, III sued Dr. and Mrs. James Wood and Woodrow Barham for the wrongful appropriation of corporate assets. Before the filing of Dr. Arthur Wood's single complaint against all three defendants, Dr. and Mrs. James Wood had filed a Chapter 11 petition. A dispute subsequently ensued as to whether the entire matter fell within bankruptcy jurisdiction. The Fifth Circuit held that the "complaint [was] sufficiently related to the pending bankruptcy to allow the district court to exercise jurisdiction under section 1334." *In re Wood*, 825 F.2d at 93. The Court further stated:

> The complaint against the bankruptcy debtors could have a conceivable effect on their bankruptcy. The plaintiff seeks to recover stock and monies that the debtors allegedly appropriated from the clinic. They seek to resolve the disputed allocation of interest in the clinic. To the extent that the debtors' interest in the clinic, their stock holdings, or their withdrawals are now property of the estate, the complaint against them has a potential effect on their estate.

Id. at 93-94. The Court acknowledged the possibility that the complaint, which raised a post-petition claim, could ultimately have no effect on the bankruptcy proceeding. Unable, however, to conclude that the suit would have *no* conceivable effect on that proceeding, the court found "related to" jurisdiction as to both the debtor and nondebtor defendants, stating:

> The plaintiff has filed one complaint against the defendants seeking liability for their joint conduct. Success against any of the defendants will have a potential effect on the estate. For example, if Dr. Wood and his wife are held liable but Barham is not, the bankrupt estate may bear the entire burden of the judgment. If, on the other hand, Barham is found jointly liable, the estate may bear only a portion of the judgment. Moreover, in filing the complaint, the plaintiff challenged the combined actions of both the debtors and Barham, a non-debtor. Resolution of the dispute will necessarily involve, therefore, consideration of Barham's involvement in those actions. We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.

Id. at 94.

The degree of identity between a debtor and nondebtor codefendants was an important factor in *A.H. Robins Co.*

I, a mass tort case involving the Dalkon Shield, an intrauterine contraceptive device. In that case, A.H. Robins was faced with an overwhelming number of federal and state actions seeking damages for injuries allegedly sustained by the use of the Dalkon Shield. The pending litigation caused A.H. Robins, the manufacturer of the device, to file a petition under Chapter 11 of the Bankruptcy Code. By the time A.H. Robins filed its petition, over 5,000 suits had been filed. More than half named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. When the filing of the petition automatically stayed all suits against A.H. Robins under Section 362(a), a number of plaintiffs in suits in which A.H. Robins was named along with at least one codefendant sought to sever their actions against A.H. Robins and proceed against the codefendant or codefendants. A.H. Robins then sought injunctive relief restraining the prosecution of the actions against its codefendants. The district court granted a preliminary injunction, holding that all actions that might be satisfied from proceeds of the debtor's products liability policy with Aetna Casualty and Insurance Company were stayed, and enjoined further litigation in eight civil actions.

Shortly after entry of the preliminary injunction, A.H. Robins moved for: a determination of trial venue of all Dalkon Shield suits; identification of such cases as were "related to" the Chapter 11 case; and transfer of such cases to the Eastern District of Virginia for trial. The district court held that: (1) pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to the Chapter 11 case; (2) pursuant to Sections 157(b)(5) and 1334(b), all such actions, wherever pending, were to be tried in the Eastern District of Virginia; (3) all actions related to the Chapter 11 case then pending in or subsequently removed to any federal district court during the pendency of the Chapter 11 case were to be transferred to the Eastern District of Virginia; and (4) the court was not prevented from later abstaining under Section 1334(c)(1) or remanding under Section 1452(b). This

order and the preliminary injunction were both appealed to the Fourth Circuit.

In discussing the propriety of the stay issued against A.H. Robins' nondebtor codefendants, the Fourth Circuit stated that, although Section 362(a)(1) is generally available only to a debtor, proceedings against nonbankrupt codefendants may be stayed by a bankruptcy court where there are "unusual circumstances." *A.H. Robins Co. I*, 788 F.2d at 999. Such a situation arises when "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* The court stated that "an illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.* In addition, such a relationship may exist where codefendant liability is "directly attributable to the debtor." *Id.* at 1004.

Based on the principles outlined above, we believe the district court has "related to" subject matter jurisdiction over the breast implant claims pending against the nondebtor defendants in this case. Thousands of suits asserted against Dow Corning include claims against the nondebtors, and the nature of the claims asserted establishes that Dow Corning and the various nondebtor defendants are closely related with regard to the pending breast implant litigation.[11] Dow Chemical and Corning

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[11]The opt-out claims asserted against Dow Corning and the various nondebtor defendants generally can be divided into four categories: (i) "Multiple Implant Actions," which are actions where plaintiffs received implants manufactured by both Dow Corning and one or more of the nondebtors; (ii) "Supplier Actions," which involve claims against the nondebtors as manufacturers and claims against Dow Corning as the supplier of silicone materials to the nondebtors; (iii) "Conspiracy Actions," which allege that Dow Corning and the nondebtors conspired to defraud the plaintiffs by fraudulently withholding material

Incorporated have already asserted cross-claims against each other and Dow Corning in the underlying litigation, and the other nondebtor defendants have asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time.

We find that it is not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings. The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims. The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here.

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information regarding the hazards of breast implants; and (iv) "Form Complaint Actions," which simply name Dow Corning and the nondebtors as defendants without making any specific allegations of individual wrongdoing. (See Motion of Minnesota Mining and Manufacturing Company for an Order Pursuant to 28 U.S.C. §157(b)(5) at 7).

Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated. We conclude that Section 1334(b) jurisdiction exists over the actions pending against Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb that are the subject of the companies' Section 157(b)(5) motions.

2. Joint Insurance

Dow Corning, Dow Chemical and Corning Incorporated also argue that "related to" jurisdiction exists as to claims pending against the shareholders because the three companies share joint insurance. We believe this argument provides additional support for the existence of "related to" jurisdiction under the unique facts of this case, but address it only briefly because we have already concluded that Section 1334(b) jurisdiction exists over breast implant claims pending against Dow Corning and one or both of its parents.

Dow Corning, Dow Chemical and Corning Incorporated are co-insured under various insurance policies, which together provide over $1 billion in coverage. Dow Corning's interest in the policies is one of the largest assets of its bankruptcy estate. In addition, Dow Corning recently entered into ten new insurance settlements under which the estate will receive, if approved by the bankruptcy court, approximately $350 to $450 million in cash. Most of these settlements involve policies under which Dow Chemical or Corning Incorporated is a co-insured.

Dow Corning, Dow Chemical, and Corning Incorporated claim that the district court's order, by allowing thousands of claims to proceed separately against Dow Chemical and Corning Incorporated, will diminish the value of this major bankruptcy asset to the extent that settlements, judgments and defense costs incurred by the shareholders will exhaust policy limits otherwise available to Dow Corning, its

creditors, and individuals asserting claims in the bankruptcy proceedings. In addition, all three co-insureds argue that the policies will be further diminished if and when payments must be made to Minnesota Mining, Baxter, or Bristol-Myers Squibb. Dow Chemical has already notified insurers that it is asserting claims against the jointly-held policies on the ground that, as a co-insured, it is entitled to recover from the insurers all of its defense costs, as well as any settlements or judgments paid by it in litigating breast implant claims. The concern, then, is that permitting scores of trials against the shareholders to go forward while litigation against the debtor is stayed may result in the shareholders making claims for insurance and seeking and obtaining payment from the insurers before Dow Corning is able to make any claims of its own.

The district court rejected this argument for the existence of "related to" jurisdiction, holding that, while a bankruptcy court has broad discretion over a debtor's interest in a liability insurance policy shared with a non-debtor, no judgment has been entered yet against Dow Chemical or Corning Incorporated and neither company has a claim pending against the insurance policies at this time. We believe the district court is in error because, as we stated earlier, an immediate impact on a debtor's estate is not a prerequisite for Section 1334(b) jurisdiction. Under the facts of this case, we believe the possible depletion of insurance policies depends on contingencies sufficiently immediate to support a finding of "related to" jurisdiction. *See, e.g., A.H. Robins Co. I*, 788 F.2d at 1008 (stating that "irreparable harm would be suffered by the debtor and by the defendants since any of [the] suits against [the] co-defendants, if successful, would reduce and diminish the [debtor's] insurance fund"); *In re Zale Corp.*, 62 F.3d 746, 758-59 (5th Cir. 1995) (concluding that, where disputes regarding an insurance policy can have an effect on a debtor's estate, the bankruptcy court has "related to" jurisdiction over nondebtors' claims against the insurer); *Coar v. National Union Fire Ins. Co.*, 19 F.3d 247, 249 (5th Cir. 1994) (stating that, where there is a "cognizable threat" that insurance policy proceeds would not cover

plaintiffs' claims and could expose the debtor's estate to liability, a suit against a debtor's insurer is "related to" the debtor's bankruptcy case); *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir. 1988) (noting that the scope of a products liability insurance policy affects the size of a debtor's estate for distribution).

Dow Corning's interest in the insurance policies at issue is property of its estate under the expansive definition set forth in 11 U.S.C. § 541(a)(1). The threat posed to those insurance policies if claims pending against Dow Chemical and Corning Incorporated are permitted to go forward in a separate manner supports a finding of "related to" jurisdiction under Section 1334(b). The prospect of Dow Chemical and Corning Incorporated being able to assert mature, liquidated claims against the insurance proceeds if litigation pending against them is permitted to go forward demonstrates a conceivable impact on the bankruptcy proceedings. If it is determined that Dow Chemical or Corning Incorporated has a priority to the insurance proceeds, even if the bankruptcy court has the power to prevent payments of the proceeds while Dow Corning is in bankruptcy, the risk remains that the insurance coverage may be eviscerated when the proceeds are eventually distributed. In addition, certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately. In addition, the bankruptcy court has yet to determine whether it has the power to prevent Dow Corning's co-insureds from receiving proceeds of the jointly-held policies while Dow Corning is in bankruptcy. Resolution of the dispute over the right to proceeds alone will have a conceivable effect on Dow Corning's bankruptcy proceedings.

IV.

We next address the power of the district court, sitting in bankruptcy, to fix the venue for the trial of personal injury tort and wrongful death claims asserted in non-bankruptcy

forums pursuant to 28 U.S.C. § 157(b)(5). Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The purpose of Section 157(b)(5) is "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" *A.H. Robins Co. I*, 788 F.2d at 1011 (citation omitted). Centralization of claims increases the debtor's odds of developing a reasonable plan of reorganization which will "work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims." *Id.*

It has been established that a "bankrupt debtor who is a defendant in a personal injury action may move under section 157(b)(5) to transfer the case to one of two venues: (1) the district where the bankruptcy is proceeding; or (2) the district where the claim arose." *In re Pan Am Corp. I*, 16 F.3d at 516. The question for our consideration is whether Section 157(b)(5) allows for the transfer of personal injury and wrongful death claims pending against nondebtor defendants who have been sued with a debtor under claims of joint and several liability.

The Fourth Circuit has construed Section 157(b)(5) as permitting the transfer of such cases, and we follow that Circuit's approach. In *A.H. Robins Co. I*, by the time A.H. Robins filed its Chapter 11 petition, 5,000 suits were pending against the company. More than half of those cases named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. After the district court issued a preliminary injunction against suits by A.H. Robins' codefendants, A.H. Robins moved for a determination of trial venue of all Dalkon Shield suits, an identification of cases "related to" the

bankruptcy case, and the transfer of those cases to the district court where the bankruptcy proceedings were being held for trial. The district judge held that, pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings "related to" A.H. Robins' Chapter 11 case and that, pursuant to Sections 1334(b) and 157(b)(5), all such actions, wherever pending, were to be tried in the Eastern District of Virginia. In addition, the district court held that all actions "related to" the Chapter 11 case then pending in any federal district court or subsequently removed to any federal district court during the pendency of A.H. Robins' bankruptcy case were to be transferred to the Eastern District of Virginia.

In reviewing the validity of the district court's order fixing the venue for the trial of all Dalkon Shield cases and transferring such cases to the Eastern District of Virginia, the Fourth Circuit stated: "Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases." *Id.* at 1010 (stating also that the power of the district court to fix venue for all the pending Dalkon Shield tort cases is "stated in unmistakable terms in section 157(b)(5)"). The Fourth Circuit stated its intent in consolidating the Dalkon Shield litigation as follows:

> Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all

> interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. In addition, the real purpose of the proceedings (i.e., a reorganization of the debtor and its continuance as a going business) could be attained.

Id. at 1013 (footnote omitted). The court stated that these objectives could not be achieved until "all Dalkon Shield claims and suits [were] centralized before a single forum where all interests [could] be heard and in which the interests of all claimants with one another [could] be harmonized." *Id.* at 1014. The court concluded by stating:

> That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

Id. at 1014.

We agree with the Fourth Circuit that Section 157(b)(5) should be read to allow a district court to fix venue for cases pending against nondebtor defendants which are "related to" a debtor's bankruptcy proceedings pursuant to Section 1334(b).[12] This approach will further the prompt, fair, and complete resolution of all claims "related to" bankruptcy proceedings, and harmonize Section 1334(b)'s

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[12]We note that our holding here is limited to the district court's ability to consider motions under 28 U.S.C. § 157(b)(5) with respect to the *trial* venue of the breast implant claims at issue.

broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate.

V.

Finally, a Section 157(b)(5) motion "requires an abstention analysis." *In re Pan Am Corp.*, 950 F.2d 839, 844 (2d Cir. 1991) ("*In re Pan Am Corp. II*"). The abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. *In re Salem*, 783 F.2d at 635. It is for the district court to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." *Id.*

Section 1334 provides for two types of abstention: discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Section 1334(c)(2) states in relevant part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be

commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Non-core proceedings under Section 157(b)(2)(B) (i.e. liquidation of personal injury tort or wrongful death case) are not subject to Section 1334(c)(2)'s mandatory abstention provisions pursuant to 28 U.S.C. § 157(b)(4).[13]

The district court in this case determined that Section 157(b)(4) rendered exempt from the mandatory abstention requirement all personal injury tort claims pending solely against Dow Corning, and decided not to abstain discretionarily with regard to those claims at this time. Because the district court found that it did not have subject matter jurisdiction over the claims pending against the nondebtor defendants, it did not address the abstention issue in detail and merely incorporated by reference its analysis of the abstention issue pertaining to claims pending solely against Dow Corning. It also remains to be fully determined whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption under Section 1334(c)(2) have been met. The district court did not directly address these matters, and we refrain from addressing them in the first instance. Because we believe the district court is in a better position to make the necessary abstention determinations, as to both mandatory and discretionary abstention, we remand the case to the district court for further proceedings on this issue.

VI.

We **REVERSE** the district court's determination that it lacked subject matter jurisdiction over the tort claims pending against the nondebtor defendants and that it did not

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[13]Section 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

have the power to transfer those claims pursuant to Section 157(b)(5). In addition, we **REMAND** this case to the district court for further proceedings on the issue of Section 1334(c) abstention.

Nos. 95-2034/2082/2084/2106/2107

United States Court of Appeals For The Sixth Circuit

ORDER

IN RE: DOW CORNING CORPORATION,

Debtor,

HEIDI LINDSEY, REP. OF CHARLOTTE MAHUM AND CHERYL KAHN; *et al.*,

Plaintiffs,

OFFICIAL COMMITTEE OF TORT CLAIMANTS; *et al.*,

Plaintiffs-Appellees,

v.

O'BRIEN, TANSKI, TANZER and YOUNG HEALTHCARE PROVIDERS OF CONNECTICUT, *et al.*,

Defendants,

DOW CORNING CORPORATION, *et al.*,

Defendants-Appellants.

BEFORE: MARTIN and BATCHELDER, *Circuit Judges*; and WISEMAN,* *District Judge.*

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the

* Hon. Thomas A. Wiseman, Jr., Senior Unites States District Judge for the Middle District of Tennesse, sitting by designation

suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

This panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

This panel is, however, issuing an amended opinion in which we adhere to the April 9, 1996 decision in this case, but seek to clarify the scope of the ruling and the impact it is intended to have. The opinion is therefore amended and reissued as follows. Mandate to issue immediately.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN

Leonard Green, Clerk

(2) (2)

Nos. 96-330, 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, et al.,
Petitioners,
v.
DOW CORNING CORPORATION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY AND CORNING INCORPORATED IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's ruling on the motion to transfer when no cases have yet been transferred and the district court's second denial of transfer is currently the subject of another appeal now pending in the Sixth Circuit.

2. Whether litigation against non-debtors is "related to" a bankruptcy only when a judgment against the defendant in that litigation would result in the automatic creation of contribution or indemnity liability against the debtor.

3. Whether district courts, in exercising the power to fix trial venue provided in 28 U.S.C. § 157(b)(5), may transfer, to the district where a bankruptcy is pending, cases related to the bankruptcy.

RULE 29.6 STATEMENT

The Dow Chemical Company and Corning Incorporated each own 50% of Dow Corning Corporation. The following is a list of nonwholly owned subsidiaries of Dow Corning Corporation:

Devonshire Underwriters Limited
Dow Corning de Argentina S.A.I.C.
Dow Corning de Brazil LTDA
Dow Corning de Colombia, S.A.
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuala S.A.
Dow Corning Chile S.A.
Dow Corning Taiwan Inc.
Dow Corning Thailand Ltd.
Dow Corning Construction S.A.
DC STI S.A.
Dow Corning France S.A.
Dow Corning Investment S.A.
Dow Corning Coordination Center S.A.
Dow Corning Limited
Dow Corning S.A.
Dow Corning STI Limited
DC Krafft S.A.

The Dow Chemical Company has no parent company. The following is a list of nonwholly owned subsidiaries of The Dow Chemical Company:

Destec Energy, Inc.

Corning Incorporated has no parent company. The following is a list of nonwholly owned subsidiaries of Corning Incorporated:

Corning Incorporated Foreign Sales Corporation
Corning France, S.A.
Corning Japan K.K.

Corning Asahi Corporation
Corning Asahi Video Products Company
Iwaki Corning (M) SDN BHD
Dominique Dutscher, S.A.
Siecor Corporation
Siecor Mexico S.A. de C.V.
Siecor S.A. de C.V.
Associated Clinical Laboratories L.P.
CORNING SciCor Limited Partnership
CORNING Bio Inc.
Pathology Building Partnership
CALP S.p.A.
EuroKera S.N.C.
Keraglass
Morgane S.A.
Samcor Glass Limited
Sicover, S.A.
Siecor GmbH
Siecor GmbH & Co. KG
International Hau-Mei Glass Engineering Co., Ltd.
Optical Waveguides Australia Pty. Ltd.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning (U.K.) Ltd.
Shanghai Corning Engineering Corporation Ltd.
Optical Fibres
Samsung-Corning Co., Ltd.
Samsung Corning Company (Malaysia) SDN BHD
N-Cor, Ltd.
ACOR Programs, Inc.
CeraMem Separations, Inc.
Cormetech, Inc.
American Video Glass Company
Watkins Glen International, Inc.
Corporate Venture Partners
Samsung Corning Precision Glass Co., Ltd.
Corsam Glasstec R&D Center

Doan Associates
Eurokera North America, Inc.
Fairfield Venture Partners II, L.P.
Fiber Sensys, Inc.
Molecular Simulations, Inc.
MDL Information Systems, Inc.
Pittsburgh Corning Corporation
U.S. Conec, Ltd.
Steuben Partners, L.P.
Surgical Eye Enterprises L.P.
Surgical Eye Institute L.P.
Clinical Pathology Institute
Nevillewood L.P.
Pharmakon Research & Development
Hazleton Clinical Research Institute Inc.
Bio-Imaging Technologies, Inc.
Quanterra Incorporated
Home Access Health Corp.

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BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a[1]) is reported at 86 F.3d 482. The opinions of the district court (Pet. App. 29a-56a and 57a-64a) are reported at 187 B.R. 919 and 187 B.R. 934 respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The petitions for rehearing were denied on June 3, 1996. Pet. App. 65a. The petitions for writ of certiorari were filed on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Background.

Dow Corning Corporation ("Dow Corning" or "the debtor") is a leading manufacturer of silicone industrial products. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. C.A. App. 3033. In 1991, the peak year for sales of Dow Corning's breast implant products, silicone gel breast implants constituted less than 1% of Dow Corning's total sales. *Ibid.*

Studies by disinterested scientists have consistently found no connection between silicones and disease. See Marcia

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[1] References in this brief to "Pet." and "Pet. App." are to the Petition and attached Appendices filed by the Official Committee of Tort Claimants in No. 96-330. The petition filed in No. 96-742 is cited as "O'Quinn Pet."

Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* 195-197 (1996) ("several good epidemiologic studies have failed to show an association between implants and a host of connective tissue diseases, symptoms, and abnormal lab tests. * * * The best evidence now is a relative risk of 1.0, indicating no contribution of implants to disease").[2] Nonetheless, tens of thousands of recipients of Dow Corning's breast implants have sued in recent years, claiming to have contracted various diseases as a result of the silicones in their implants. Pet. App. 3a.

In thousands of these cases, the plaintiffs have sued not only Dow Corning, but also its corporate parents, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"), even though neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. *Id.* at 4a-5a. The Shareholders, in turn, have each asserted cross-claims against Dow Corning for indemnity and contribution. *Id.* at 13a; C.A. App. 2028, 2135-2140. All of the claims against

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[2] Dr. Angell is executive editor of *The New England Journal of Medicine*. See also, *e.g.*, J. Sanchez-Guerrero, et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666, 1670 (1995) (Harvard Medical School study concluding that "we found no evidence of an association between silicone breast implants and either connective-tissue diseases defined according to a variety of standardized criteria or signs or symptoms of connective-tissue disease"). Petitioners' allegations about the testing and safety of silicones (Pet. 4-5) are wildly inaccurate and inconsistent with all of the responsible scientific studies performed in recent years. See generally *Artiglio v. Corning Inc.*, 56 Cal. Rptr. 2d 877 (App. 1996) (describing tests on silicone compounds and holding that there is no basis to impose liability on Dow Chemical or Corning).

the Shareholders are brought by plaintiffs who are also asserting the same claims against the debtor, seeking recovery for the same alleged injuries resulting from the same products — the debtor's implants. C.A. App. 2027-2133, 3035-3036, 3049-3050. Thus, all of the cases against the debtor and its Shareholders raise the same threshold issue — do Dow Corning's implants cause disease, as the tort claimants assert? [3] C.A. App. 107, 2028, 2032-2133. Throughout this litigation, Dow Corning and its Shareholders have suggested that the federal courts keep open the option of eventually holding a single trial to resolve this common, potentially dispositive, question. *E.g.*, C.A. App. 198-206, 1181-1193, 1203-1207, 1215-1216.

B. Dow Corning's Shared Insurance With Dow Chemical And Corning.

For many years, Dow Corning shared insurance coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. As the court of appeals noted, Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate"; the policies have total aggregate coverage limits of more than $1 billion. Pet. App. 21a.

The court of appeals held — and petitioners do not contest in this Court — that if the claims against Dow Chemical and Corning proceed "separate[ly]," the debtor's "insurance coverage may be eviscerated when the proceeds are eventually distributed." Pet. App. 23a. This could occur because settlements or judgments paid by the Shareholders, or defense expenses incurred by the Shareholders, are reim-

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[3] Some cases include claims that implants have ruptured or leaked, but those cases also allege uniformly that the implants cause disease.

bursed by joint insurance proceeds that would otherwise be part of the debtor's estate. *Id.* at 22a-23a.

C. The Proceedings Below.

Shortly after its Chapter 11 filing, Dow Corning moved under 28 U.S.C. § 157(b)(5) to transfer to the Eastern District of Michigan, where its bankruptcy case is pending, all pending breast implant claims involving Dow Corning implants — that is, all of the claims against Dow Corning and its Shareholders. Dow Chemical and Corning joined in that motion. Pet. App. 4a-5a. The motion to transfer covered claims that were in federal court under diversity jurisdiction, as well as claims that had been, or were in the process of being, removed from state courts pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). *Ibid.*

In September 1995, the district court granted the transfer motion as to the claims against the debtor, but refused to transfer the claims against the Shareholders, ruling that the latter claims were not "related to" the debtor's bankruptcy case. Pet. App. 29a; see 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings * * * related to cases under title 11"). In so ruling, the district court expressly noted that

> one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending.

Pet. App. 47a. The court indicated that it would remain open to the possibility of having a common issues trial at some point in the future, *id.* at 48a, 53a-54a, and in the meantime, transferred the claims against the debtor to Judge Pointer in the Northern District of Alabama for consolidated

pretrial proceedings, subject to the Bankruptcy Code's automatic stay. *Id.* at 47a. Pursuant to an order of the Multidistrict Litigation Panel, Judge Pointer has been overseeing all of the federal breast implant cases since 1992, including claims against the debtor and its Shareholders. *In re Silicone Gel Breast Implants Prods. Liab. Litig. (MDL 926)*, 793 F. Supp. 1098 (J.P.M.L. 1992).

The Sixth Circuit reversed the district court's refusal to transfer the claims against the Shareholders. First, the court held that contribution or indemnity claims that may be brought against the debtor were "contingent claims against Dow Corning" that "obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization." Pet. App. 20a.

Second, the court of appeals gave an "additional" reason for finding "related to" jurisdiction under § 1334(b) with respect to the claims against the Shareholders. Pet. App. 21a. The court held that there was a significant risk that the Shareholders would be "able to assert mature, liquidated claims against the [joint] insurance proceeds if litigation pending against them is permitted to go forward." *Id.* at 22a, 23a. As a result, the court held that the joint insurance proceeds available to the debtor may be substantially depleted when those proceeds are ultimately distributed. *Id.* at 21a, 23a. Indeed, the court of appeals noted that

> certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately.

Id. at 23a.

The Sixth Circuit also concluded that district courts have the power, under 28 U.S.C. § 157(b)(5), to fix trial venue for claims "related to" the bankruptcy in the district where the bankruptcy is pending. *Id.* at 23a-26a. In so holding, the court followed the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), another mass tort case. In *Robins*, the Fourth Circuit held that claims related to a bankruptcy case could be centralized in one forum under § 157(b)(5); this provided an opportunity for adoption of a "mechanism for dispute resolution" that would obviate the need for "innumerable trials, stretching over an interminable time" and would avoid the "stupendous costs that would be involved if all the claims here had to be tried." 788 F.2d at 1013 (quoted at Pet. App. 25a-26a).

D. Subsequent Proceedings.

On remand from the Sixth Circuit's decision, the district court, in an order entered on July 30, 1996, again declined to transfer the claims against the Shareholders, this time on the ground that it would abstain from hearing those claims. Dow Corning and its Shareholders have appealed from this order. That appeal is currently pending in the Sixth Circuit. *In re Dow Corning Corp.*, Nos. 96-2005, 96-2008, 96-2009, 96-2010, 96-2011, 96-2012, 96-2013, 96-2139 (consolidated) (6th Cir.).

In the MDL case, Judge Pointer has continued to preside over a host of ongoing pretrial matters. In addition to coordinating discovery efforts and other pretrial activity, Judge Pointer has recently appointed a panel of neutral experts, pursuant to Fed. R. Evid. 706, to evaluate and critique the pertinent scientific literature and studies. *In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926)*, Order Nos. 31 (May 30, 1996), 31A (June 10, 1996), and 31B (June 13, 1996). (Dow Corning had previously moved

in the bankruptcy court for appointment of a Rule 706 panel. The bankruptcy judge has not yet ruled on Dow Corning's request.)

REASONS FOR DENYING THE PETITIONS

The questions presented in the petitions clearly do not warrant this Court's review. The most obvious reason is that, as a result of the district court's July 1996 order denying respondents' motion to transfer, petitioners have not been affected in any way by the Sixth Circuit's April 1996 decision that the district court had jurisdiction to entertain respondents' motion to transfer the claims against the Shareholders to the Eastern District of Michigan for trial. Unless respondents prevail in their pending Sixth Circuit appeal from the district court's most recent order, the issues raised in the petitions will be moot. And if respondents do prevail in that appeal, the questions presented here may be raised in a subsequent petition from the upcoming Sixth Circuit decision.

In any event, there is no circuit conflict on the issue whether potential contribution or indemnity claims, arising out of the debtor's acts, establish "related to" jurisdiction under 28 U.S.C. § 1334(b). The circuits agree that there is jurisdiction under § 1334(b) as long as it is *possible* that a case *may* affect the bankruptcy. Nor are the circuits divided on whether a district court has the authority, in setting trial venue under 28 U.S.C. § 157(b)(5), to transfer cases related to the bankruptcy to the district where the bankruptcy is pending for trial. Indeed, in accordance with the plain language of the statute, the circuits have uniformly upheld the power to order such transfers in appropriate cases. See, *e.g.*, *Robins*, 788 F.2d at 1010.

I. RECENT DEVELOPMENTS IN THIS CASE MAKE REVIEW COMPLETELY UNNECESSARY.

The principal point in the petitions — that this Court's review is essential so that the claims against the Shareholders are not transferred to the Eastern District of Michigan for trial — is simply inexplicable. As noted above, the district court, on July 30, 1996, again refused to transfer the claims against the Shareholders, on grounds different from those articulated before. The Sixth Circuit is currently reviewing that decision. Under these circumstances, there obviously is no need to review the earlier Sixth Circuit decision that the district court had jurisdiction to entertain the transfer motion. If the Sixth Circuit affirms the most recent decision denying transfer (or dismisses the appeal for lack of jurisdiction, as petitioners have requested), then the Sixth Circuit's earlier decision on transfer will be of academic interest only. That decision would have no impact on this case; the bottom line would be that no transfers will occur regardless of whether this Court affirmed or reversed the Sixth Circuit decision that is the subject of the current petitions for certiorari.

Alternatively, if the current Sixth Circuit appeal results in reversal of the district court's refusal to transfer, petitioners may then seek review of *that* decision, at which time they could raise the very issues they are raising now. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). If that occurs, the Court, in deciding whether to review the transfer issue at that time, would have the benefit of the Sixth Circuit's most recent views on the best way for the judiciary to manage this massive litigation.

"[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893). This is just such

a case. This Court has long followed the general rule that it will not grant certiorari when the courts below have not yet reached a final decision on a particular issue and later events in the case may make the issues raised in the petition moot or insignificant. *Ibid.*; see also, *e.g.*, *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The reasons for denying review are even stronger here. Because of intervening events in the district court, the petitioners are not harmed in any way by the decision that they challenge in the petitions. On the contrary, the current posture is that transfer has been denied, exactly the result that petitioners have requested. Under these circumstances, it would be imprudent for the Court to grant review at this juncture.

II. THE SIXTH CIRCUIT'S RULING ON "RELATED TO" JURISDICTION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The petitions for certiorari rest largely on the premise that the Sixth Circuit's decision on "related to" jurisdiction conflicts with rulings in other circuits. Pet. 12-18; O'Quinn Pet. 8-11. In fact, however, the purported conflict is illusory with respect to the issues involved in this case; the Sixth Circuit's ruling is fully consistent with decisions of other courts of appeals. While the circuits may be "split on how best to interpret this statutory language" in other contexts, *In re Fedpak Systems, Inc.*, 80 F.3d 207, 213 (7th Cir. 1996), they are not divided in any way that is relevant to this case.

1. The Sixth Circuit held that the possibility that the debtor would be held liable to non-debtors for contribution or indemnity "suffices to establish a conceivable impact on the estate in bankruptcy." Pet. App. 20a. Other courts of appeals have reached the same conclusion. See *In re G.S.F.*

Corp., 938 F.2d 1467, 1476 (1st Cir. 1991) (a "potential indemnity claim" is related to the bankruptcy because it "puts the * * * estate at risk of liability for what could be a substantial damage award"); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989) ("Potential liability" of non-debtors, who could assert indemnity claim against the debtor, would be "'related' to the bankruptcy" if the non-debtors filed their "contingent claims" against the estate by the bar date); see also *In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987) (finding "related to" jurisdiction over suit against non-debtor where, depending on the outcome of the litigation, the debtor "may bear" all, part, or none of the judgment).

It is true, of course, that in its 1984 decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), the Third Circuit stated that an action between non-debtors that could result in a contribution action against the debtor is related to the bankruptcy only if a judgment against the defendant would result in the "automatic creation of liability" against the debtor. *Id.* at 995. As the Sixth Circuit observed, however, the facts in this case are dramatically different; "there is a qualitative difference" between the "single possible claim for indemnification" at issue in *Pacor* and the "threat" to a reorganization plan that is "posed by the thousands of potential indemnification claims at issue here." Pet. App. 20a-21a.

More fundamentally, as the Sixth Circuit also noted (Pet. App. 15a), the Third Circuit no longer follows *Pacor*'s requirement of "automatic" liability. Instead, the Third Circuit now adheres to the consensus view that "a civil proceeding is related to bankruptcy" if "the outcome of that proceeding could *conceivably* have any effect on the estate." *Pacor*, 743 F.2d at 994 (emphasis omitted). In fact, the author of *Pacor* (Judge Garth) has joined in an opinion explaining that

> [a] key word in this test is "conceivable." *Certainty, or even likelihood, is not a requirement.* Bankruptcy jurisdiction will exist so long as it is *possible* that a proceeding *may* impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (emphasis added) (citing, *inter alia*, the Sixth Circuit's decision in *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 (1991), *cert. dismissed*, 503 U.S. 978 (1992)).[4] The Third Circuit's most recent discussion of "related to" jurisdiction reaffirms the *Marcus Hook* standard. *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 (3d Cir. 1996).

All of this is consistent with a long line of cases holding that actions involving non-debtors that *may* affect a bankruptcy are within federal jurisdiction under § 1334(b). This Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), is but one example. In *Celotex*, the Court held that "related to" jurisdiction was established where, if suits against the debtor's sureties proceeded, the sureties (a) "'would *seek* to lift the Section 105 stay to reach Debtor's collateral,'" (b) triggering actions by debtor to preserve its rights, (c) both of which "'*could* completely destroy any chance of resolving the prolonged insurance coverage disputes,'" and (d) settlement of the insurance disputes "'*may well be* the linchpin of Debtor's formulation of a feasible

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[4] The *Wolverine Radio* court held that there was "related to" jurisdiction even though the debtor "would not be affected until and unless" the non-debtor sought indemnification. 930 F.2d at 1143. The court recognized that the non-debtors' dispute "may ultimately have no effect on the debtor." *Ibid.*

plan.'" *Id.* at 1500 (emphasis added). See also, *e.g.*, cases cited at Pet. App. 15a-17a, 22a-23a (all holding that "related to" jurisdiction exists when third-party actions *might* affect the bankruptcy estate); *Zerand-Bernal Group v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994) (Posner, C.J.) (one purpose of § 1334(b) is to "force into the bankruptcy court suits to which the debtor need not be a party but which *may* affect the amount of property in the bankrupt estate") (emphasis added); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) ("The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome *might* have any '*conceivable* effect' on the bankrupt estate") (emphasis added).

In short, there is no circuit split on whether potential contribution or indemnity claims against the debtor, based on the debtor's alleged conduct, are sufficient to provide a basis for "related to" jurisdiction. To the contrary, in accordance with this Court's decision in *Celotex*, the courts of appeals recognize uniformly that such claims are related to the bankruptcy because they may affect the size of the estate, the length of time bankruptcy proceedings are pending, and the debtor's ability to finally resolve its liabilities in the reorganization process.

2. It is simply not true that the Sixth Circuit's decision is "a recipe for total paralysis" and that the cases against the Shareholders are "effectively frozen pending resolution of the * * * bankruptcy." Pet. 9, 11. Rather, in recognition of the significant impact that those claims — all based on allegedly defective Dow Corning products — could have on Dow Corning's reorganization efforts, Dow Corning is simply attempting to keep the claims against it and its Shareholders together in one federal court so that this massive litigation can be coordinated in a sensible and economical fashion. That is the only way to maximize the assets in Dow Corning's estate and optimize the chances for a successful

reorganization, while at the same time resolving Dow Corning's contingent breast implant liabilities comprehensively and equitably.

This would not, as the petitioners assert, bring the cases to a grinding halt. On the contrary, discovery and other pretrial activities can continue (and have continued) in a coordinated, coherent fashion. To be sure, keeping all of the cases against the debtor and its Shareholders together will prevent the threat of scores of simultaneous *trials*.[5] But this is likely to facilitate resolution of the cases, not impede it. A single judge in control of all of the cases could ensure an orderly scheduling of trials so that the burden of defending them — and the drain on the joint insurance — does not become overwhelming.

Even more importantly, that judge would also be in the best position to devise means of resolving, in a single proceeding, issues common to all of the cases, such as whether the debtor's implants cause disease. *E.g.*, *In re Bendectin Litig.*, 857 F.2d 290, 294, 308-317 (6th Cir. 1988) (ruling that the district court properly held a causation-only trial to determine whether Bendectin causes birth defects), *cert. denied*, 488 U.S. 1006 (1989); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (approving the use of a consolidated trial to litigate whether the defendants' products were defective and the state of the art defense in thousands of asbestos cases). Indeed, the court of appeals stressed that its "primary goal" in this litigation is "to establish a mechanism for resolving the claims at issue in

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[5] "[M]any" cases are not "verging on trial." Pet. 11. In connection with the district court's most recent denial of transfer — now on appeal in the Sixth Circuit — petitioners identified only 14 cases with actual trial dates in the near future, none of which involves the Shareholders.

the most fair and equitable manner possible." Pet. App. 7a. Along these lines, Judge Pointer in recent months has appointed a Rule 706 panel of independent experts to assist in the resolution of scientific issues in the MDL proceeding, and the bankruptcy judge is currently considering Dow Corning's motion for appointment of a Rule 706 panel to be used as part of the bankruptcy process. There might also be a common issues trial in the Eastern District of Michigan to resolve the question whether Dow Corning's implants cause disease — an issue that the debtor *and* the Shareholders face in all of the cases against them. Other alternatives are available as well.[6]

Efforts like these not only go a long way to avoiding the dissipation of the joint insurance proceeds that might otherwise result from massive, simultaneous, and uncoordinated litigation against the debtor's Shareholders, but they preserve the opportunity to resolve *all* of the claims involving the debtor's products expeditiously, on a global basis. If, on the

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[6] For example, Judge Pointer has already granted final summary judgment in favor of Corning, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995), and has narrowed (and pursuant to some pending motions, could further narrow) the remaining issues with respect to Dow Chemical. In addition, Judge Pointer currently has before him Dow Chemical's motion to certify for immediate appeal, under 28 U.S.C. § 1292(b), the court's ruling on Dow Chemical's motion for summary judgment. A ruling by the Eleventh Circuit in Dow Chemical's favor on the merits, in whole or in part, would, of course, resolve or, at a minimum, further streamline the litigation against Dow Chemical. As these examples illustrate, the possibility of a global resolution of the claims against the Shareholders — which otherwise threaten to drain the debtor's available insurance — and of avoiding the need for repetitive, duplicative briefing and/or trials in a series of courts is obviously enhanced if all of the cases are kept together in federal court.

other hand, the claims against the Shareholders are not transferred, thousands of cases against them will be tried separately, in virtually every jurisdiction in the country — an endeavor that will take years, cost enormous sums of money, and occupy vast blocks of judicial time. This would not only have a detrimental effect on the overwhelming majority of individual tort claimants, waiting for trials at the end of very long queues, but it could significantly delay the debtor's reorganization efforts (as well as deplete the size of the estate due to the erosion of the joint insurance).

3. The result here does not threaten the usurpation of "state judicial authority," as petitioners warn. Pet. 10. For one thing, thousands of the claims against the Shareholders will never be tried in state court even if this Court were to reverse the Sixth Circuit. There is federal jurisdiction over those claims for reasons unrelated to the bankruptcy; they are in federal court under diversity or federal question jurisdiction. C.A. App. 2032-2047, 2077-2083, 2105-2112. Well before Dow Corning's bankruptcy, these claims against the Shareholders were consolidated in front of Judge Pointer. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

As for the remaining claims, to the extent that § 1334(b) means that some state court suits are subject to the bankruptcy court's "related to" jurisdiction, that is a function of the "breadth," *Celotex*, 115 S. Ct. at 1499, of the language that Congress used in drafting the statute. Courts have held consistently since the statute was passed that state court litigation can be "related to" a bankruptcy proceeding within the meaning of § 1334(b). Thus, it has long been accepted that state court actions that may affect the size of the debtor's estate — in particular, suits that may affect the debtor's insurance (see Pet. App. 22a-23a) — are within the district court's "related to" jurisdiction.

In most cases, however, the practical effect of § 1334(b) on state court litigation is minimal; in a typical bankruptcy, many state cases are never transferred to federal court because the district court abstains. 28 U.S.C. § 1334(c)(1), (2). But "related to" jurisdiction, in conjunction with the venue-fixing power of 28 U.S.C. § 157(b)(5), also provides a means for the courts, in the interest of judicial efficiency, to attempt to resolve thousands of claims affecting the debtor's estate in one forum. Pet. App. 24a-26a; *Robins*, 788 F.2d at 1010-1014. Nothing in the statutory language requires that federal courts be deprived of that flexibility when needed in unusual circumstances.

4. Petitioners' contention that contribution or indemnity claims against the debtor are "farfetched" (Pet. 18) does not provide a basis for this Court's review either. As a factual matter, petitioners are wrong; the Shareholders have *already* asserted cross-claims for indemnity and contribution against Dow Corning. See p. 2, *supra*. Moreover, because the factual predicates for those claims and the context in which they will be litigated are not yet known, the Sixth Circuit correctly concluded that "the possibility of contribution or indemnification liability in this case is far from attenuated." Pet. App. 21a. This Court does not typically review factual determinations like that. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* 189 (7th ed. 1993).

III. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The second question presented by petitioners concerns a district court's ability to transfer claims that affect a bankruptcy case: petitioners contend that district courts have *no* power to transfer *any* claims involving non-debtors under 28

U.S.C. § 157(b)(5). Pet. 19-23; O'Quinn Pet. 17-20. In other words, petitioners' theory is that even if it is indisputable that claims against third parties will have an effect on a bankruptcy case — say, by dissipating insurance proceeds that would otherwise be available to the estate — a district court would have no authority to transfer such cases to the district in which the bankruptcy was pending. Rather, a district court would have the power to transfer *only* claims asserted directly against the debtor.

1. No court has ever adopted such an extreme limitation on the power to transfer.[7] And the only other circuit to address the question whether personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5) when those claims are not against the debtor agrees with the Sixth Circuit. In *Robins*, the Fourth Circuit answered that question in the affirmative, reaching the same conclusion as that reached by the Sixth Circuit here. See 788 F.2d at 1010 (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all the Dalkon Shield

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[7] Petitioners cite *In re United States Lines*, 128 B.R. 339 (S.D.N.Y. 1991), for the proposition that § 157(b)(5) is only "a venue-setting provision for personal injury tort cases *against the debtor*" (Pet. 19-20), but that case says nothing of the sort. It holds only that claims pending in state court could not be transferred to federal court under § 157(b)(5) — a ruling that is no longer good law, having been rejected by the Second Circuit. See *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court).

cases").[8] Thus, there is no disagreement among the courts of appeals on this question of statutory construction.

2. Petitioners' argument that § 157(b)(5) is limited to claims "against the debtor" (Pet. 19) is also contrary to the plain language of the statute. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5); rather, the statute grants district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims" generally. Nor is there anything to the argument that because Congress referred *elsewhere* in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the district court's powers under § 157(b)(5). See Pet. 20 (quoting § 157(b)(2)(B)). Quite the contrary — Congress's decision to qualify personal injury claims in one section but not in another demonstrates clearly that "Congress, *when it desired to do so*, knew how to restrict the scope of" personal injury claims. *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (emphasis added). Congress's use of a "broader phrase" in § 157(b)(5) than in § 157(b)(2)(B) "strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[ ]." *Ibid.*

3. The purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization. Pet. App. 24a; *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). As the court of appeals

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[8] Petitioners' contention that the *Robins* court did not order the transfer of claims against non-debtors (Pet. 21) is meritless. The Fourth Circuit unequivocally upheld the district court's authority to order the transfer to the Eastern District of Virginia of "*all actions related to* the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998 (emphasis added).

recognized, the statute gives district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which would inevitably harm the reorganization process.[9] Pet. App. 24a-26a. Indeed, if the transfer of "related to" claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can *do* something if the cases *are* related, like ordering a transfer.

* * *

The Sixth Circuit's refusal to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending is fully supported by precedent, logic, and the language of § 157(b)(5). There is no reason for this Court to grant review on the second question presented in the petitions.

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[9] Centralization is particularly important with regard to the Shareholders because, wholly apart from the effect of separate litigation on the joint insurance, the claims against the debtor and the claims against the Shareholders are the *very same claims*: they are brought by the same plaintiffs, involve the same Dow Corning products, and have the same factual issues. There is no reason to require a plaintiff seeking compensation for one injury to litigate the same issues on two fronts — as part of the bankruptcy process *and* in state court.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996

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Nos. 96-330 & 96-742

In the Supreme Court of the United States

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OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,
Respondents.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK,
Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,
Respondents.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

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QUESTIONS PRESENTED

1. Whether the court below erred in finding "related to" subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over tort claims pending against Baxter that were asserted jointly and severally against Baxter and a Chapter 11 Debtor, Dow Corning Corporation, in pre-bankruptcy tort actions.

2. Whether the court below erred in concluding that 28 U.S.C. § 157(b)(5) authorizes a district court in which a Chapter 11 bankruptcy case is pending to transfer civil actions "related to" the bankruptcy case, when such actions allege a single cause of action against both Baxter and Dow Corning Corporation.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed by petitioners, Baxter Healthcare Corporation was a party to the proceedings below.

STATEMENT REQUIRED BY RULE 29.6

Respondent Baxter Healthcare Corporation is a wholly-owned subsidiary of respondent Baxter International Inc., which is a publicly-owned corporation. Baxter Healthcare Corporation has no non-wholly owned subsidiaries. The non-wholly owned subsidiaries of Baxter International Inc. are Baxter S.A. (Belgium); Baxter S.A. (France); Baxter Healthcare (Holdings) Ltd. (U.K.); Baxter Healthcare Limited (U.K.); Baxter World Trade S.A. (Belgium); Baxter Healthcare Pty. Ltd. (Australia); Baxter A.G. (Switzerland); and Baxter S.A. de C.V. (Mexico).

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-330

OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,
Respondents.

No. 96-742

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK,
Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

Baxter International Inc. and Baxter Healthcare Corporation (collectively, "Baxter") hereby oppose the petitions for a writ of certiorari filed by the Official Committee of Tort Claimants (the "Committee Petition") and by the breast implant tort claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Petition", and, together, the "Petitions"). The merits of this case involve the application of the provisions of a discrete jurisdictional statute to the facts of a mass tort litigation in which Baxter, among others, and a Chapter 11 debtor, Dow Corning Corporation, are defendants. Given the procedural posture of the case, the questions presented are not ripe for this Court's consideration, and the Petitions should be denied on that basis alone. Even if the merits were ripe for consideration, however, the questions presented are not worthy of this Court's attention. The decision below is not at odds with any decision of any court of appeals, and is entirely consistent with this Court's recent decision in *Celotex Corp. v. Edwards,* 115 S. Ct. 1493 (1995). Accordingly, the Petitions should be denied.

OPINIONS BELOW

In addition to the opinions cited by petitioners, the opinions below include the opinion issued on July 30, 1996 by the district court, in which that court, pursuant to 28 U.S.C. § 1334(c), declined to exercise jurisdiction over the claims against Baxter and the other nondebtor co-defendents, which the Sixth Circuit had held to be "related to" the Debtor's bankruptcy. This opinion is reprinted at Resp. App. 1a-8a.

STATEMENT OF THE CASE

Petitioners load their statements of the case with "facts" that are both highly disputed and immaterial to the issues presented by the decision below. Baxter will not burden the Court with a point-by-point response, but will instead confine its statement to material facts relevant to the questions presented for the Court's consideration.

1. Breast implants containing silicone have been on the market for more than 30 years. Originally designed by plastic surgeons in cooperation with Dow Corning Corporation ("Dow Corning" or the "Debtor"), these devices were believed to be superior in their cosmetic and reconstructive uses to implants made of other substances. By most accounts, the Debtor manufactured at least one-half of the silicone gel-filled implants sold during that period. The balance were manufactured by other companies including 3M (or its affiliates), Bristol-Myers (or its affiliates), and Heyer-Schulte, the manufacturer whose products are the cause of Baxter's involvement in this dispute (collectively, the "Co-defendants").[1] The Debtor was also the source of much of the silicone gel used in implants manufactured by other companies, including more than 90 percent of the implants sold by Heyer-Schulte. Moreover, every single implant manufactured by Heyer-Schulte had at least one silicone component manufactured by the Debtor.

Because the Debtor itself manufactured massive numbers of implants and was a principal supplier of the silicone used by these other implant makers, the Debtor and its affiliates were routinely named as co-defendants in lawsuits involving implants manufactured by others. By the date of the Debtor's Chapter 11 petition, tens of thousands of suits involving silicone breast implants had been brought in the United States. The actions in which both the Debtor and Baxter are defendants number more than 5,000, involving more than 14,000 plaintiffs. In most of these actions, the Debtor and Baxter are alleged to be

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[1] Baxter has never designed, manufactured, or marketed breast implants. Baxter is a defendant in these cases only because Baxter is, as a consequence of a series of corporate acquisitions and mergers, responsible for certain liabilities of Heyer-Schulte, the entity that manufactured the implants. Accordingly, the name "Heyer-Schulte" is used where appropriate in this opposition.

joint tortfeasors and jointly and severally liable for the damages asserted.

Indeed, every plaintiff who has sued both the Debtor and Baxter on account of silicone breast implants alleges that she suffers from one or more diseases caused by silicone, and that silicone was introduced into her body by both companies in one of two ways—either the plaintiff underwent multiple implants with devices manufactured and sold by both the Debtor and Heyer-Schulte, or the plaintiff received Heyer-Schulte implants containing silicone gel (or other components) manufactured by the Debtor. Thus, each plaintiff alleges a single set of symptoms, a single chemical agent of disease, and a single cause of action involving two defendants—two defendants whose responsibility for those symptoms and that disease is, from each plaintiff's perspective, unitary. This describes the thousands of cases in which Baxter and the Debtor are co-defendants that were the subject of the motion filed by Baxter in the district court pursuant to 28 U.S.C. § 157(b)(5); similar motions were filed by 3M and Bristol Meyers (collectively, the "Co-defendant Motions").

2. The Co-defendant Motions asked the district court to exercise its jurisdiction under 28 U.S.C. § 1334(b) and to exercise its power under 28 U.S.C. § 157(b)(5) to order that the personal injury tort and wrongful death claims "be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5). On September 12, 1995, the district court denied transfer of the claims covered by the Co-defendant Motions on the ground that it lacked subject matter jurisdiction over the tort actions. Committee Pet. App. at 57a-64a.

On appeal, the court of appeals was required to decide whether the billions of dollars in lawsuits against Baxter and the other Co-defendants, with the attendant billions of dollars in contribution claims against the Debtor by the Co-defendants, could conceivably have an effect on

the administration of the Debtor's estate. The Sixth Circuit decided that, under well-established and non-controversial legal principles, the lawsuits could have such an effect and, accordingly, held that "related to" jurisdiction under 28 U.S.C. § 1334(b) exists with respect to these personal injury claims. Committee Pet. App. at 1a-28a.

The Sixth Circuit further concluded that 28 U.S.C. § 157(b)(5) permits the district court to fix the trial venue of all breast implant cases pending against Baxter and the other Co-defendants that are "related to" the Debtor's bankruptcy proceeding. Committee Pet. App. at 23a-26a. The court of appeals then remanded the case to the district court to determine "whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption [sic] under Section 1334(c)(2) have been met." Committee Pet. App. at 28a. The district court was also directed to address the issue of discretionary abstention under 28 U.S.C. § 1334(c)(1). *Id.*

3. On July 30, 1996, the district court on remand ruled that all of the personal injury actions against all of the Co-defendants were subject to mandatory abstention under 28 U.S.C. § 1334(c)(2) and, in the alternative, exercised its discretion to abstain from hearing those actions pursuant to 28 U.S.C. § 1334(c)(1). Resp. App. at 1a-8a. Baxter and the other Co-defendants have appealed the abstention order to the Sixth Circuit, which has expedited review, notwithstanding petitioners' attempt to have such appeals dismissed. Thus, as this opposition brief is being submitted to this Court, this case is awaiting a second Sixth Circuit decision. Although a successful appeal by the Debtor or the Co-defendants could potentially make this issue ripe—although certainly not worthy of certiorari—the procedural posture of the action below makes review of these petitions premature. The district court is not currently exercising jurisdiction over any of the claims that are covered by the Co-defendant Motions,

and not a single case against the Co-defendants has been transferred to the district court.

REASONS FOR DENYING THE PETITIONS

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO ISSUE THAT IS RIPE FOR THIS COURT'S CONSIDERATION.

As this Court noted long ago, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). That context is wholly absent here. *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

Indeed, petitioner Tort Committee recognizes this problem, acknowledging that, at least for now, the district court's decision to abstain stands. Undaunted, however, petitioner Tort Committee argues that "the general significance of what the Sixth Circuit has held remains unimpaired" and that the "sweeping dimensions of 'related to' jurisdiction as defined by the Sixth Circuit may be counted on to serve the visible purpose of both blocking state litigation and transferring it from the court in which plaintiffs have exercised their right to proceed." Committee Pet. at 11-12.

Petitioners' invitation to the Court to issue a sweeping advisory opinion should be declined. If the Sixth Circuit were to reverse the July 30 district court order and if, upon remand, the district court were to exercise jurisdiction over the claims against Baxter and the other Co-defendants, petitioners would be free to present their argu-

ments anew in a second petition for certiorari. It is well established that this Court may reach back and decide "all of the substantial federal questions determined in the earlier stages of the litigation." *Mercer v. Theriot,* 377 U.S. 152, 153 (1964) (quoting *Reece v. Georgia,* 350 U.S. 85, 87 (1955)); *see also Scott v. United States,* 436 U.S. 128 (1978) (same); *Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941) (same); *Hamilton-Brown Shoe Co.,* 240 U.S. at 257 (same). Granting the Petitions at this stage of the litigation would be a waste of this Court's limited resources.[2]

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY APPLIED SETTLED LAW IN A DECISION THAT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

Petitioner Tort Committee asserts that the opinion issued by the Sixth Circuit "represents an unprecedented expansion of bankruptcy jurisdiction." Committee Pet. at 4. It does not. As a review of the substantial precedent interpreting 28 U.S.C. § 1334(b) makes quite clear, virtually all of the courts of appeals, and this Court, have articulated the same standard for determining whether a bankruptcy court or district court has jurisdiction over a case that is "related to" a case under Chapter 11. The Sixth Circuit's opinion is neither unprecedented nor is it any jurisdictional expansion at all; in fact, the approach of the Sixth Circuit to determining whether a proceeding is "related to" a Chapter 11 case is thoroughly conservative.

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[2] The argument made in the O'Quinn Petition, that mootness should not preclude review at this juncture because the issue at bar is "capable of repetition yet evading review," O'Quinn Pet. at 2. n.2, is sorely misplaced. This Court's opinion in *Celotex* makes clear that this issue is not capable of evading review.

Only last term, in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), this Court construed Section 1334(b) subject matter jurisdiction broadly, citing with approval the numerous decisions of courts of appeals that have held that a case is "related to" a Chapter 11 case if its outcome could "conceivably have any effect on the estate being administered in bankruptcy." *Id.* at 1499 n.6 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Indeed, this Court noted that in crafting Section 1334, Congress broke with narrower, past jurisdictional grants to bestow broad and comprehensive, though certainly not limitless, jurisdiction on bankruptcy courts. *Celotex*, 115 S. Ct. at 1499.

A careful reading of *Celotex* is itself sufficient to defeat petitioners' argument. In *Celotex*, this Court explicitly adopted the Third Circuit's conclusion in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," along with its rather obvious caution that " 'related to' jurisdiction cannot be limitless." *Celotex*, 115 S. Ct. at 1499 (citing *Pacor*, 743 F.2d at 994). While the Court did not explicitly endorse the "conceivable effect" test (or any other test for that matter) for "related to" jurisdiction adopted by virtually every circuit, it *did* cite with approval the leading bankruptcy treatise that was the source of the "any effect" or "conceivably have any effect" standard. *Celotex*, 115 S. Ct at 1498-99 n.5 (citing 1 *Collier on Bankruptcy* ¶ 3.01[1][c][iv] at 3-28 to 3-29 (15th ed. 1995)). And this Court did point out that the "conceivable effect" test is the law in nine of the eleven circuits that have spoken on the issue. *Id.* at 1499 n.6.[3]

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[3] As will be discussed below, this Court did not find that the circuits were split on this issue. Rather, it noted that two of the circuits (the Sixth not among them) have adopted a "slightly different test." 115 S. Ct. at 1499 n.6. Under any formulation of the test, the claims in these cases are unquestionably "related."

Moreover, the Court did not endorse the Third Circuit's somewhat restrictive application of the "conceivable effect" test in *Pacor*. In essence, the Court held that under any relevant test, the injunction in *Celotex* fell within the "related to" jurisdiction of the bankruptcy court. The same is true of the ruling here.

There is much in *Celotex* that supports the approach employed by the Sixth Circuit. In deciding not to dissolve the injunction against certain non-debtor third parties, the bankruptcy court in *Celotex* made the following findings:

> [I]f the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.

In re Celotex Corp., 140 B.R. 912, 915 (Bankr. M.D. Fla. 1992), *quoted in Celotex*, 115 S. Ct. at 1500. This Court's repetition of such a chain of "conceivable effects" as supporting its jurisdictional conclusion in *Celotex* is striking. And its reason for this reference was to drive home a fundamental, long-standing point about bankruptcy jurisdiction:

> In light of these findings by the Bankruptcy Court, it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bank-

> ruptcy courts may extend more broadly in the former case than in the latter. Cf. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 676, 79 L. Ed. 1110, 55 S. Ct. 595, 606 (1935).

Celotex, 115 S. Ct. at 1500.

The Court noted that its holding "is in accord with representative recent decisions of the Courts of Appeals." *Celotex*, 115 S. Ct. at 1500. It then listed three decisions that epitomize the practical approach to jurisdiction that the Sixth Circuit has followed for over a decade. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 624 (9th Cir. 1989); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); *Oberg v. Aetna Casualty & Surety Co. (In re A.H. Robins Co.)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988). Each of these cases involved the exercise of bankruptcy jurisdiction over claims between non-debtors, and each of these cases was resolved by determining whether *substantive* provisions of the Bankruptcy Code authorized or prohibited the relief sought. "Related to" jurisdiction, if discussed at all, was upheld summarily.

The decision below follows longstanding Sixth Circuit precedent. For over a decade, the Sixth Circuit has consistently held that where the facts of a case suggest that the potential for contribution claims against the debtor is real and there is therefore a genuine likelihood that tort actions could have an impact on the debtor's estate, the underlying tort actions that originally named the debtor as a co-defendant are "related to" the bankruptcy case. Moreover, the Sixth Circuit, for years, has consistently applied the holding that automatic debtor liability is not a prerequisite to "related to" jurisdiction. *See Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626 (6th Cir. 1986) (upholding "related to" jurisdiction despite

absence of automatic debtor liability); *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (same); *Michigan Employment Security Commission v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992) (same); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993) (same); *8300 Newburgh Road Partnership v. Time Construction, Inc. (In re Time Construction, Inc.)*, 43 F.3d 1041 (6th Cir. 1995) (per curiam) (similar conclusion in dicta).

Furthermore, there simply is no circuit split on this issue. To attempt to create a split with the Sixth Circuit, petitioners allege a "direct conflict" (Committee Pet. at 9, O'Quinn Pet. at 8-10) with the Third Circuit's holding in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984). This Court found no such split last year, when it noted in *Celotex* that eight circuits had adopted the *Pacor* "any conceivable effect" test with "little or no variation," and that two circuits "seem to have adopted a slightly different test." *Celotex*, 115 S. Ct. at 1499 n.6. Even more importantly, this Court cited the Sixth Circuit's decision in *Salem Mortgage—which applied the exact same rule of law as did the opinion below*—as one of the many circuit opinions that had followed the approved portion of *Pacor* with little or no variation.

Indeed, it is evident from opinions rendered after *Pacor*, that the Third Circuit perceives no conflict with its sister circuits and has retreated from the very narrow facet of *Pacor* upon which the Tort Committee places total reliance, *i.e.*, that a claim against a third party must "automatically" create liability against the debtor to fall within the court's "related to" jurisdiction.[4] Thus, in *In re Marcus Hook*

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[4] It is also important to note that the Sixth Circuit below, applying the approach that has pervaded its analysis and the analysis of

Development Park, Inc., 943 F.2d 261 (3d Cir. 1991), the Third Circuit held that "related to" jurisdiction existed over an action between two third parties relating to property that had once been part of the debtor's estate, even though there was no certainty that resolution of the dispute would have any impact on the debtor's estate. Construing the very statutory subsection at issue here, the Third Circuit repeatedly quoted from and relied upon decisions from the Fifth and Sixth Circuits, including *Salem*:

> A proceeding is related to bankruptcy if *"the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy," Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original). *Accord In re Fietz*, 825 F.2d 455, 457 (9th Cir. 1988); *Matter of Wood*, 825 F.2d at 93 [5th Cir. 1987]; *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re A.H. Robins Co., Inc.*, 788 F.2d 994, 1002 n.11 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed.2d 177 (1986); *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986). A key word in this test is "conceivable." Certainty, or even likelihood, is not a requirement. *In re Wolverine Radio Co.*, 930 F.2d at 1143 [6th Cir. 1991]. Bankruptcy jurisdiction will exist so long as

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other circuit courts for over a decade, indicated that the facts before it distinguished this case from *Pacor*. The Sixth Circuit held that:

> [T]here is a qualitative difference between the single suit involved in Pacor and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here. Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent co-defendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated.

Committee Pet. App. at 20-21a.

> it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate." *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989). *Accord Pacor, Inc. v. Higgins*, 743 F.2d at 994.

943 F.2d at 264 (emphasis in original, bracketed notations supplied). Accordingly, even if the Third Circuit may have started out in a slightly different position as to how the "related to" standard applies, subsequent rulings of that court make clear that it views its position as in accord with the other circuits.[5] *See also Torkelsen v. Maggio (In re Guild and Gallery Plus, Inc.)*, 72 F.3d 1171, 1181 (3d Cir. 1996) (applying *Marcus Hook* holding). There

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[5] The argument of the O'Quinn Petitioners, that the opinion below splits with the Second and Eleventh Circuits, borders on frivolous. The Eleventh Circuit correctly noted that the decision in *Salem Mortgage*—in a specific holding that was directly quoted and reaffirmed in the opinion below—was among the more *conservative* opinions on the issue of "related to" jurisdiction, because it required that the connection to the estate not be overly remote. *See Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990) (citing *Salem* approvingly and noting Sixth Circuit's conservative requirement that possibility of effect on estate not be remote). In the opinion below, the Sixth Circuit, citing *Salem*, again reaffirmed that " 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement' of Section 1334(b)." Committee Pet. App. at 10a (*citing Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990), *citing Salem Mortgage*, 783 F.2d at 634). Like this Court, the Sixth Circuit has repeatedly made clear that "related to" jurisdiction is not limitless.

The contention of a split with the Second Circuit is equally misguided. The O'Quinn Petition alleges a split with the Second Circuit based on one line in *In re Turner*, 724 F.2d 338 (2d Cir. 1983), in which that court noted that a "significant connection" to the estate was lacking in the case before it. In addition to the fact that this Court cited the *Turner* opinion in *Celotex* and found no split, there is simply no divergence between the *Turner* holding and that of the Sixth Circuit.

is simply no existing circuit conflict warranting this Court's review.[6]

Petitioners present no basis for disturbing the Sixth Circuit's application of well-settled precedent to the facts of this mass tort bankruptcy. The claims of the tort plaintiffs against Baxter are at least as closely "related to" the Debtor's bankruptcy as the claims of numerous entities as to whom jurisdiction was upheld in cases cited without objection by this Court in *Celotex*.

Baxter is a co-defendant with the Debtor in single causes of action that, in the aggregate, were the cause of the Debtor's resort to Chapter 11. It is a co-defendant, either because a plaintiff received multiple implants manufactured by *both* Heyer-Schulte and the Debtor, or because—if a Heyer-Schulte implant alone was at issue—every single implant ever made by Heyer-Schulte contained a silicone component manufactured by the Debtor. As a Co-defendant, Baxter has contingent, unliquidated claims for contribution and indemnity the size of which will be determined *exclusively* by the success of the plaintiffs' claims against Baxter. Moreover, as a party potentially co-liable with the Debtor, Baxter has the right to file, and intends timely to file, claims in the bankruptcy case for every claimant who asserts claims against Baxter for which

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[6] Respondents recognize that the Seventh Circuit, citing no judicial precedent but its own, has applied a slightly more restrictive inquiry. *See In re Fedpack Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Seemingly defensive about its decision not to follow the otherwise universal "conceivable effect" standard, that circuit court noted that "[w]hile the United States Supreme Court appears to favor a broad interpretation, it has not mandated such an approach." *Id.* at 213. The Seventh Circuit's somewhat more conservative variation of the *Pacor* test scarcely constitutes a split with its sisters. In any event, that the Seventh Circuit might apply a "slightly different test" *Celotex, supra*, 115 S. Ct. at 1499 n.16, is surely no reason to grant certiorari on a centrist opinion issued by the Sixth Circuit and on facts that would readily satisfy the Seventh Circuit standard.

the Debtor may be co-liable. 11 U.S.C. § 501(b); Fed. R. Bankr. P. 3005. Indeed, Baxter has already filed over 13,000 such claims in the Debtor's bankruptcy proceedings.

Although acknowledging that billions of dollars are at stake, petitioners nevertheless maintain that it is a "flight of advocates' fancy" (Committee Pet. at 18) to assume that any of the Co-defendants would seek indemnity or contribution from the company that was both the dominant manufacturer of breast implants and the principal supplier of raw materials used by other manufacturers in the production of breast implants. If a flight of fancy is anywhere to be found, it is in this contention. Baxter fully intends timely to file all proofs of claim necessary to preserve its legal rights against the Debtor.

Indeed, the repeated assertions in the Petitions that the Co-defendants have not yet filed contribution and indemnity claims—from which the petitioners ask this Court to draw various conclusions—are of no moment. The deadline for filing such claims is January 15, 1997. As Baxter has told every court and every attorney in this case from its inception, Baxter *will* file the claims necessary to preserve its rights by that date. Furthermore, it is ironic that the same plaintiffs who filed complaints asserting joint and several liability against Baxter and the Debtor now assert that there is no conceivable connection between their cases against Baxter and their cases against the Debtor—cases severed only because of the Debtor's intervening bankruptcy filing.

III. CONTRARY TO PETITIONERS' ASSERTION, THE SIXTH CIRCUIT WAS ENTIRELY CORRECT IN ITS READING OF 28 U.S.C. § 157(b)(5).

Petitioners also argue that the court below erred in holding that 28 U.S.C. § 157(b)(5) allows a district court to fix the trial venue of breast implant cases pending against Baxter and other Co-defendants that are "related to" the Debtor's bankruptcy proceedings pursuant to Section 1334(b). The Sixth Circuit's holding, argue

petitioners, is not only a "misreading" of the statute but also a threat to "the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy." Committee Pet. at 19; O'Quinn Pet. at 17. On the contrary, the holding of the Sixth Circuit is based squarely on the only logical reading of the text of the statute, is consistent with the few cases that have interpreted it, and unquestionably promotes the statute's "oft-stated goal of centralizing the administration of a bankruptcy estate." Committee Pet. App. at 26a.

Petitioners' argument is based on words not found in the statute rather than on the language of the statute itself. First, petitioners note that the word "transfer" does not appear in the text of § 157(b)(5), and from this conclude that "transfer" is not available to Baxter even if "related to" subject matter jurisdiction exists. Petitioners ignore the fact that courts have consistently found "transfer" to be the proper relief under the statute. *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994); *Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839 (2d Cir. 1991); *A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Calumet National Bank v. Levine (In re Levine)*, 179 B.R. 117 (N.D. Ind. 1995).[7]

These courts have recognized that Congress' purpose in enacting § 157(b)(5) was "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" *A.H. Robins*, 788 F.2d at 1011 (citation

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[7] Petitioners also argue that transfer pursuant to § 157(b)(5) is available only for tort claims "against the debtor", and that the Sixth Circuit erred in relying on *Robins* as authority for the transfer of non-debtor cases. Petitioners' arguments are unavailing. The words "against the debtor" similarly do not appear in the statute, and the transfer authorized in the *Robins* case (whether ultimately effected or not) covered entire actions, including claims against non-debtors as well as claims against the debtor.

omitted). Transfer is the only efficient means by which to accomplish these goals.

Recognizing the enormous implications to any Dow Corning reorganization posed by the thousands of potential contribution and indemnity claims held by the Co-defendants, the Sixth Circuit fully embraced the Fourth Circuit's reasoning in *A.H. Robins* that, especially in the context of a mass tort case, the centralization of all personal injury claims "increases the debtor's odds of developing a reasonable plan of reorganization which will 'work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims.'" Committee Pet. App. at 24a, *citing A.H. Robins*, 788 F.2d at 1011. Petitioners offer no reason, compelling or otherwise, to disturb the Sixth Circuit's correct application of § 157(b)(5) to the facts of this case.

IV. THE PETITIONS PRESENT NO ISSUE OF "DOCTRINAL SIGNIFICANCE" THAT WARRANTS REVIEW BY THIS COURT.

The issue of national importance purportedly raised by petitioners is that under the rule of law applied by the Sixth Circuit here, legions of tort claims that should properly be prosecuted in state courts will now improperly be placed in the "deep freeze" of bankruptcy. A review of the statutory structure and of the subsequent events on remand in this case make clear that this alleged concern is vastly overstated. Although Section 1334(b) informs the threshold inquiry as to whether bankruptcy jurisdiction exists over particular claims, it in no way ends the inquiry as to whether bankruptcy jurisdiction will be exercised over them. Thus, after concluding that "related to" jurisdiction existed under Section 1334(b) over claims against the Co-defendants, the Sixth Circuit remanded for a determination as to whether it was appropriate under 28 U.S.C. § 1334(c) for the district court to abstain from hearing particular matters. As the Sixth Circuit noted in its opinion below, citing to its holding in *Salem*:

> [t]he abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. It is for the district court to 'determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases.'

Committee Pet. App. at 27a (citing *Salem, supra*).[8]

In sum, petitioners' policy concerns are as exaggerated as their legal issues are premature. Accordingly, the Court should decline to review this case.

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[8] *See also Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) ("the abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case); *Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 n.16 (11th Cir. 1990) ("[w]e agree with the Fifth Circuit's opinion in *Wood* that the abstention provisions of 28 U.S.C. § 1334(c)(1) (1988) at least partially address the comity issue and obviate the need for an overly restrictive interpretation of the jurisdictional grant of § 1334(b)").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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November 27, 1996

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT
HON. DENISE PAGE HOOD

IN RE: DOW CORNING CORPORATION,
Debtor.

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. INTRODUCTION:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. ANALYSIS:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatory abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdic-

tion over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowances of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;*
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims.*

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28

U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning, supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predomi-

> nate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . . in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning

Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. CONCLUSION:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

DATED: Jul. 30, 1996

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

Nos. 96-330 & 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA MINING AND MANUFACTURING COMPANY

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over silicone gel breast implant claims pending against non-debtor codefendants because such claims were "related to" the chapter 11 case of Dow Corning Corporation.

2. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had the power under 28 U.S.C. § 157(b)(5) to fix the venue for trial of silicone gel breast implant claims pending against nondebtor codefendants which are "related to" the chapter 11 case of Dow Corning Corporation.

LIST OF PARTIES

In addition to the parties listed in the caption, the following are parties to the proceeding in the Sixth Circuit: Baxter Healthcare Corporation; Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack; Mississippi Physicians; and Official Committee of Unsecured Creditors, as Intervenor.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondent Minnesota Mining and Manufacturing Company states that it does not have a parent company. Its subsidiaries (other than wholly owned subsidiaries) are Eastern Heights State Bank of St. Paul (Minn.), Sumitomo 3M Limited (Japan), 3M Health Care Limited (Japan), 3M Korea Limited (Korea), and Birla 3M Limited (India).

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Respondent, Minnesota Mining and Manufacturing Company ("3M") respectfully requests that this Court deny the petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petitions") seeking review of the Sixth Circuit's decision in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330).

OPINIONS BELOW

The opinion of the Sixth Circuit (Tort Comm. Pet. App. 1a-28a),[1] is reported at 86 F.3d 482 (6th Cir. 1996). On June 3, 1996, the Sixth Circuit issued its mandate and denied petitions for rehearing and rehearing en banc (*id.* at 65a-66a). The initial opinions of the United States District Court for the Eastern District of Michigan (*id.* at 29a-64a) are reported at 187 B.R. 919 (E.D. Mich. 1995) and 187 B.R. 934 (E.D. Mich. 1995). The opinion of the United States District Court for the Eastern District of Michigan on remand (App., *infra*, RA 1-RA 8) is unreported.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved are:

28 U.S.C. § 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil

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[1] "Tort Comm. Pet. App." refers to the appendix to the Petition for a Writ of Certiorari of the Offical Committee of Tort Claimants.

> proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 157(b)(5), which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

Dow Corning Corporation ("DCC") was the predominant producer of silicone gel breast implants until it ceased their manufacture in 1992. Because thousands of recipients of silicone gel breast implants asserted claims for compensatory and punitive damages in federal and state court actions against DCC, on May 15, 1995, DCC was forced to file for protection under chapter 11 of title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Michigan.

On the date DCC commenced its chapter 11 case, over 7,000 implant lawsuits, representing the claims of over 15,000 plaintiffs, had been filed against respondent 3M, which ceased manufacturing breast implants in 1984. Record 265.[2] DCC has been named as a codefendant with 3M in over 5,000 of those 7,000 lawsuits. *Id.* In virtually every case, plaintiffs asserted claims of joint and several liability against 3M and DCC for the full amount of their asserted damages. *Id.* Additionally, in approximately 60% of the cases against 3M, the plaintiff received multiple sets of breast implants in a series of separate operations, including implants made by

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[2] "Record __" refers to the Record filed in connection with the decision below.

3M and at least one other manufacturer, which included DCC in most cases. Record 473.

Thousands of other cases were also filed against Bristol-Myers Squibb Corporation and Medical Engineering Corporation (together "Bristol-Myers"), Baxter International Incorporated and Baxter Healthcare Corporation (together "Baxter"), as well as other defendants, including the 50% shareholders of DCC, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning," and collectively with 3M, Bristol-Myers, Baxter, and Dow Chemical, the "Nondebtor Codefendants"). As with the cases against 3M, many of the cases against the other Nondebtor Codefendants also named DCC as a codefendant, asserted joint and several liability, and involved implants from multiple manufacturers.

The decision below held that the claims against the Nondebtor Codefendants were related to DCC's reorganization case within the meaning of 28 U.S.C. § 1334(b) because DCC's successful reorganization would be directly impacted by the resolution of the thousands of claims for indemnification and contribution generated by the breast implant actions, including claims asserted by the Nondebtor Codefendants against DCC and vice versa.

Background

Prior to DCC's chapter 11 filing, on June 25, 1992, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") ordered the centralization of pretrial proceedings in all of the thousands of federal breast implant actions that have been filed against DCC and the Nondebtor Codefendants, and transferred the actions to Chief Judge Pointer of the Northern District of Alabama (the "Multidistrict Court"). *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1101 (J.P.M.L. 1992). The MDL Panel

found that these actions involve complex common questions of fact and that centralization would best serve the convenience of the parties and witnesses, promote the just and efficient conduct of litigation, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.*

On March 23, 1994, a proposed class action settlement (the "1994 Settlement") was reached among DCC, the Nondebtor Codefendants, and the plaintiffs' steering committee, and was approved by the Multidistrict Court by order dated September 1, 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). By mid-1995, however, it became apparent that the funds provided for in the 1994 Settlement would be inadequate to fund the claims filed by plaintiffs who alleged, but had not proved, any causation between silicone gel breast implants and any alleged disease or injury. *Id.*

On December 22, 1995, the Multidistrict Court approved a revised version of the 1994 Settlement, which did not include DCC. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 94-P-11558-S (N.D. Ala. 1995) (Order No. 27 approving revised settlement program and injunctions). Various appeals have been taken regarding the revised settlement, which are currently pending in the Eleventh Circuit.

Proceedings Below

A. The District Court

As a result of DCC's chapter 11 filing on May 15, 1995, the silicone gel breast implant actions of plaintiffs who had, at that time, opted out of the 1994 Settlement (collectively, the "Implant Actions") were automatically stayed from prosecution against DCC pursuant to 11 U.S.C. § 362(a). The

Implant Actions against the Nondebtor Codefendants, however, were not stayed despite the fact that in most cases joint and several liability was asserted against DCC and one or more of the Nondebtor Codefendants.

In June 1995, DCC and the Nondebtor Codefendants filed separate motions pursuant to 28 U.S.C. § 157(b)(5) to transfer to the District Court for the Eastern District of Michigan (the "District Court") the claims asserted in pending federal and state court Implant Actions in which DCC was a party (collectively, the "Implant Claims"). Specifically, on June 12, 1995, DCC moved to transfer to the District Court the Implant Claims pending against it and its shareholders, Dow Chemical and Corning, indicating that it would seek to have the transferred claims consolidated for a threshold jury trial on the issue of whether silicone gel breast implants caused the diseases which were alleged. Record 2. Dow Chemical and Corning joined in DCC's motion. *Id.* Similarly, on June 14, 1995, 3M, Baxter, and Bristol-Myers each filed a motion to transfer the Implant Claims asserted in Implant Actions in which the respective Nondebtor Codefendants were named as codefendants with DCC. Record 6, 15. No request to transfer was made in cases in which DCC was not involved.

By memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 29a-56a), the District Court asserted jurisdiction under 28 U.S.C. § 1334(b) with respect to the Implant Claims pending against DCC and permitted transfer of such claims pursuant to 28 U.S.C. § 157(b)(5), without ordering the generic causation trial that DCC had requested. Record 389. However, the District Court denied DCC's motion to the extent it related to claims against its corporate shareholders, Dow Chemical and Corning. *Id.*

By separate memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 57a-64a), the District Court denied all of the Nondebtor Codefendants' § 157(b)(5) transfer motions on the ground that it lacked subject matter

jurisdiction over the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(b) because such claims were not "related to" DCC's bankruptcy. Record 388.

B. The Court of Appeals

Applying the broad jurisdictional grant of 28 U.S.C. § 1334(b), the Sixth Circuit reversed the District Court's determination that it lacked subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants and that it did not have the power to transfer those claims pursuant to 28 U.S.C. § 157(b)(5). Tort Comm. Pet. App. 28a.

In reaching its holding, the Sixth Circuit concluded that its decision would "further the prompt, fair, and complete resolution of all claims 'related to' bankruptcy proceedings and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate." *Id.* at 26a. Because the joint liability claims pending against DCC and the Nondebtor Codefendants give rise to contingent claims for indemnification or contribution among all of the defendants, including DCC, which could ripen into fixed claims, the potential that DCC will be held liable to the Nondebtor Codefendants for indemnification or contribution, or vice versa, "suffices to establish a conceivable impact" on DCC's estate. *Id.* at 20a.

The Sixth Circuit believed that in the event plaintiffs were to prevail on their respective claims against the Nondebtor Codefendants, the possibility of liability for contribution or indemnification was "far from attenuated." *Id.* at 21a. Accordingly, the Sixth Circuit concluded that there is § 1334(b) subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants because claims for indemnification or contribution, whether asserted against or by DCC, would "affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [DCC's] ability to resolve its liabilities and proceed with

reorganization." *Id.* at 20a. The Sixth Circuit refrained, however, from addressing the issue of abstention under 28 U.S.C. § 1334(c) in the first instance and remanded to the District Court for further case by case proceedings on that issue. *Id.* at 28a.

On July 30, 1996, the District Court abstained from adjudicating all the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(c)(1) and (2). App., *infra*, RA 1. The Nondebtor Codefendants have appealed that decision to the Sixth Circuit (the "Abstention Appeal"). Record 552, 553, 557, 560, 563, 566, 567. When petitioner Official Committee of Tort Claimants (the "Tort Committee") moved to dismiss the Abstention Appeal on jurisdictional grounds, the Sixth Circuit ordered that the jurisdictional issue be argued along with the merits of the appeal and established an expedited briefing schedule. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, Nos. 96-2005, 96-2008 to 96-2013, slip op. at 2 (6th Cir. Sept. 24, 1996). Final briefs were filed on November 19, 1996. Oral argument has not yet been scheduled.

REASONS FOR DENYING THE WRIT

The procedural posture of the decision below weighs heavily against petitioners' request for a writ of certiorari. The questions presented are not ripe for review at this time because the Nondebtor Codefendants are currently appealing from the District Court's decision, on remand, to abstain from exercising its subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants. As a result, unless and until the District Court's abstention decision is reversed, there is no controversy for the Court to resolve. On the other hand, in the event the District Court's abstention decision is affirmed or the appeal is dismissed, a decision by this Court would be an advisory opinion rendered in the absence of an actual case or controversy.

Moreover, petitioners have failed to demonstrate any compelling reason that would warrant this Court's review. While the issues are of importance to the parties to the proceeding, they are of minimal importance to the development of the law. Petitioners have also failed to demonstrate the existence of a conflict of decisions among the courts of appeals. In its decision, the Sixth Circuit neither criticized nor refused to follow the decisions of other circuit courts of appeals. In fact, the Sixth Circuit expressly stated that it adopted the Third Circuit's test established in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), for determining whether a proceeding is related to a bankruptcy case under 28 U.S.C. § 1334(b).

Not only is the decision below consistent with those circuit court decisions alleged by petitioners to be conflicting, but it also is completely consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). Notwithstanding petitioners' assertion of an alleged conflict of decisions, the errors asserted essentially consist of the "misapplication," in petitioners' view, of a properly stated rule of law. This clearly does not constitute a compelling reason for certiorari review.

Finally, petitioners have failed to demonstrate that the Sixth Circuit misapplied either (i) 28 U.S.C. § 1334(b) by ruling that the Implant Claims against the Nondebtor Codefendants were related to DCC's bankruptcy case, or (ii) 28 U.S.C. § 157(b)(5) by ruling that the District Court had the power to fix venue for trial of the Implant Claims against the Nondebtor Codefendants.

I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME

The decision to grant certiorari "represents a commitment of scarce judicial resources." *City of Okla. City v. Tuttle*, 471

U.S. 808, 816 (1985). In this regard, the ripeness doctrine prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). It is a principle of timing in which the Court must look at the situation at the present time rather than at the time of the decision below. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (citing *Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974)). The doctrine is often used where future events may affect the justiciable nature of a controversy, making it more apt for review at a later date. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Thus, an action must be sufficiently mature so that it is considered an actual case or controversy as required by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Although the Court has jurisdiction to review interlocutory judgments of federal courts of appeals, *see* 28 U.S.C. § 1254(1), the Court will generally not exercise its jurisdiction before a final judgment is issued in the lower courts. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The Court has frequently determined that issues remanded by courts of appeals were unfit for review pending final judgment and subsequent court of appeals review. For example, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the Court denied certiorari to review a decision of the court of appeals which remanded the case to the district court for the determination of an appropriate remedial course in

the matter under review. *Id.* In refusing to grant the writ, the Court stated "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.*[3]

Consistent with these cases, the questions presented in the Petitions are not ripe for Supreme Court resolution in light of the pending appeal from the District Court's decision to abstain from exercising its subject matter jurisdiction. In the event the Sixth Circuit either affirms or declines to review the District Court's abstention decision, the questions presented in the Petitions will become moot. The issues of related to jurisdiction under 28 U.S.C. § 1334(b) and transfer pursuant to 28 U.S.C. § 157(b)(5) will not be appropriate for certiorari review until and unless the Sixth Circuit reverses the District Court's abstention decision. If the Sixth Circuit either (1) dismisses the appeal on jurisdictional grounds or (2) affirms on the merits, no Implant Claims against the Nondebtor Codefendants will be transferred, and there will be no actual controversy for this Court to consider.

Moreover, in the event the Sixth Circuit issues a final judgment on the abstention issues, there is a significant likelihood that a subsequent petition for a writ of certiorari will be filed. Accordingly, denial of petitioners' request for a writ of certiorari at this time further serves the federal policy against piecemeal litigation. *See Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("In the absence of clear and explicit authorization by Congress, piece-meal appellate review is not favored.").

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[3] *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *cf. Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (Court initially denied certiorari where court of appeals remanded case until subsequent rulings were issued by district court and court of appeals); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (Court refused to review interlocutory decree and did not grant writ until second appeal after final decree).

Petitioners clearly will not suffer any hardship by a denial of certiorari at this time. As a result of the District Court's decision to abstain from exercising subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants, petitioners have thus far obtained their desired result. That is, the Implant Claims against the Nondebtor Codefendants have not been transferred to the District Court. Petitioners thus cannot argue that the decision below has affected them in any concrete manner. Withholding the Court's consideration of the questions presented at the present time would have absolutely no adverse effect on petitioners.

Accordingly, because petitioners have not suffered any injury, and any future effect of the decision below remains wholly speculative in light of the pending appeal from the District Court's abstention decision, the Court should deny certiorari as the questions presented are not ripe for review at this time.

II. THE PETITIONS FAIL TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI

The Court's review on a writ of certiorari is purely a matter of judicial discretion that is exercised "only for compelling reasons." Sup. Ct. R. 10. A petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Rather, the jurisdiction of the Court is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, the errors asserted by petitioners present no "compelling reasons" for review by the Court. Although petitioners attempt to create the appearance of a conflict between

circuits over an unsettled federal question of public importance, petitioners' reasons for review actually amount to nothing more than dissatisfaction with the Sixth Circuit's application of the rule regarding "related to" subject matter jurisdiction that has been adopted by virtually every circuit court of appeals. Accordingly, even if review at this time were not barred by the ripeness doctrine, the Petitions should nevertheless be denied.

A. Petitioners Have Mischaracterized the Importance of the Questions Presented

As the Court has observed, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975) ("In the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.").

In an effort to obtain review by the Court, petitioners have mischaracterized the Sixth Circuit's decision as a novel ruling effecting a "wholesale enlargement of the bankruptcy jurisdiction at the expense of state judicial authority." Tort Comm. Pet. 10. In actuality, however, the decision below represents nothing more than the application of well-settled and long-standing principles of law.

The so-called "enlargement" of bankruptcy jurisdiction by the Sixth Circuit in the decision below is entirely consistent with Congress's expansive grant of jurisdiction to the district courts in bankruptcy cases. In the decision below, the Sixth Circuit began with the "premise that the 'emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases.' "

Tort Comm. Pet. App. 10a (quoting *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986)). In fact, in its most recent pronouncement on this issue, this Court has agreed that the congressional intent was to " 'grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.' " *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

The decision below was premised upon the Sixth Circuit's fact-specific application of legal principles which have been adopted by this Court and every circuit court of appeals to consider the issue. Contrary to petitioners' concerns, the Sixth Circuit has not enlarged the jurisdiction of the bankruptcy courts; it merely found the existence of "related to" jurisdiction consistent with congressional intent.

In contending that the Sixth Circuit's application of this long-standing grant of jurisdictional power alters the way in which mass tort actions will be litigated in the future, petitioners ignore the abstention provisions under 28 U.S.C. § 1334(c). As Congress has indicated, "in order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court." H.R. Rep. No. 95-595, at 51 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6012. Thus, statutory abstention enables the district court, in appropriate circumstances, to determine whether hearing a particular case would " 'promote or impair efficient and fair adjudication of bankruptcy cases' " in order to serve the interests of justice and judicial economy. Tort Comm. Pet. App. 27a (quoting *Salem*, 783 F.2d at 635).

Petitioners' concern with the "prospective impact" the decision below could have on the "fundamental division of judicial authority under familiar principles of the federal system" (Tort Comm. Pet. 10), thus does not directly involve

§ 1334(b) jurisdiction, as alleged by petitioners. Rather, it involves principles of abstention—the very issue that is currently pending before the Sixth Circuit in the Abstention Appeal.[4] As this Court has stated, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1724 (1996). Any assertion concerning the impact of the decision below on the federal system will be addressed by the Sixth Circuit in the context of abstention and is thus premature and not ripe for review by the Court at this time.

Thus, contrary to petitioners' contention, the decision below does not represent a departure from existing law that alters the way in which mass tort actions will be litigated.

B. The Decision Below Does Not Present Any Conflict With Decisions of the Courts of Appeals or This Court

Because a conflict with decisions of circuit courts of appeals or this Court could constitute a "compelling reason" warranting certiorari, petitioners construct an illusory conflict between the Sixth Circuit decision below and the Third and Seventh Circuit decisions in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) and *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996), respectively, and this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995).

1. The *Pacor* Decision

Contrary to petitioners' assertion that the decision below conflicts with the Third Circuit decision in *Pacor*, the Sixth Circuit explicitly adopted the test established in *Pacor*, stat-

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[4] In the Abstention Appeal, 3M has urged reversal on the grounds that the District Court misapplied the congressionally imposed statutory criteria for bankruptcy abstention and ignored the letter and spirit of the Sixth Circuit's holding in the decision below.

ing: "Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is 'related to' a bankruptcy proceeding under Section 1334(b)." Tort Comm. Pet. App. 11a.

In *Pacor*, the Third Circuit adopted the following test for determining the existence of "related to" jurisdiction:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding *could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome *could alter* the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which *in any way impacts upon the handling and administration of the bankrupt estate*.

Pacor, 743 F.2d at 994 (emphasis added) (citations omitted).

Under the facts of that case, the Third Circuit concluded that an action between a tort plaintiff and a supplier of asbestos was not related to the bankruptcy case of the Johns-Manville Corporation, the alleged manufacturer of the asbestos. The fact that *Pacor* held that related to jurisdiction did not exist in that case, however, does not establish that the Third Circuit's decision is in conflict with the Sixth Circuit's decision below. On the contrary, as stated above, the decision below is entirely consistent with the test established in *Pacor*. After expressly stating that it adopted the *Pacor* test, the Sixth Circuit applied the *Pacor* test to the facts of DCC's bankruptcy to reach its holding that all Implant Claims, including those brought against respondent, could well alter the debtor's liability and thus have an effect on DCC's estate.

Petitioners' perceived conflict stems from the different factual circumstances in the two cases. The distinction that the Third Circuit drew in *Pacor* between the plaintiff's claim

against the supplier and the supplier's claim-over against Manville cannot be drawn in the case at bar in light of the intertwined nature of the Implant Claims against the Nondebtor Codefendants and the Nondebtor Codefendants' claims-over against DCC. In *Pacor*, there was no allegation that plaintiff had been injured by the joint conduct of the supplier and Manville or that the liability of the supplier and Manville was joint and several. Plaintiff sued only the supplier; it did not sue both the supplier and Manville. In fact, in a companion case to *Pacor* involving similar facts, the Third Circuit described the relationship as follows: "The [plaintiff-supplier] action and the [supplier]-Manville action are two *separate and distinct claims*. Their joinder or severance is merely a matter of procedural convenience, and does not imply any substantive interdependence between the two." *Hanna v. Philadelphia Asbestos Co.*, 743 F.2d 996 (3d Cir. 1984) (emphasis added).

Here, the implant plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. Thus, in each Implant Action, a single claim has been asserted against DCC and one or more of the Nondebtor Codefendants for damages arising from their alleged joint conduct. As a matter of law, where two or more parties are held jointly and severally liable for producing a single indivisible harm, the joint tortfeasors are substantively liable for all damages. 3 Fowler V. Harper et al., *The Law of Torts* § 10.1, at 7 (2d ed. 1986). Unlike the two claims in *Pacor*, which are "separate and distinct," the claims against DCC and the claims against the Nondebtor Codefendants arise out of the alleged joint conduct of multiple defendants which give rise to a single claim and are therefore substantively interdependent.

Because the implant plaintiffs challenge the combined actions of both DCC and the Nondebtor Codefendants, the resolution of such allegations necessarily involves a determination of the respective involvement of DCC and the Nondebtor Codefendants with respect to the conduct alleged.

Thus, the claims involved in the decision below are inextricably intertwined, unlike the claims in *Pacor*. Accordingly, the Sixth Circuit's decision does not conflict with the Third Circuit's decision, but, rather, follows it.[5]

Moreover, in *Pacor*, the potential impact on Manville's estate was minimal; there was no allegation that Manville's prospects for successfully reorganizing could have been affected by the plaintiff-supplier action. While *Pacor* involved only a single claim for indemnification or contribution, the decision below involved thousands of such claims. As the Sixth Circuit noted, "there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case." Tort Comm. Pet. App. 20a. Indeed, "[a] single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here." *Id.* at 20a-21a.

2. The *Fedpak* Decision

Petitioners also assert that the decision below "diverges" from the Seventh Circuit decision in *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Comm. Pet. 12. In that case, the district court determined that the debtor lacked standing to seek clarification of a bankruptcy court determination regarding the rights of various parties to a frozen dessert machine. The Seventh Circuit agreed that the debtor lacked standing, and further held that the debtor's request fell outside the scope of § 1334(b) because there was "only a remote connection between Fedpak's request for a clarifica-

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[5] In addition to following *Pacor*, the decision below also relies explicitly on another decision of the Third Circuit, *In re Marcus Hook Dev. Park Inc.*, 943 F.2d 261 (3d Cir. 1991). Tort Comm. Pet. App. 15a. Thus, rather than conflicting with the Sixth Circuit decision, Third Circuit decisions appear to have been a major source for the Sixth Circuit's analysis in reaching the decision below.

tion order and the administration of the bankruptcy estate." *Id.* at 213 n.7. Because the frozen dessert machine was no longer part of the debtor's estate, the court concluded that the request for clarification of rights in that machine would not affect the amount of property for distribution or the allocation of property among creditors. *Id.* at 214.

Notably, in addition to the fact that *Fedpak* also involved only one claim, as opposed to the thousands of claims in DCC's bankruptcy case, under *Fedpak's* formulation of the test for related to jurisdiction, the result obtained by the Sixth Circuit below would have been exactly the same. That is, related to jurisdiction would exist because the Implant Claims against the Nondebtor Codefendants affect the amount of property for distribution and the allocation of property among creditors, as set forth *supra*.

3. Other Circuit Court Decisions

In addition to asserting that the decision below conflicts with *Pacor* and *Fedpak*, petitioners Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Plaintiffs"), incorrectly assert that the decision below conflicts with other decisions of the Seventh Circuit as well as decisions of the Second and Eleventh Circuits. In actuality, however, the decision below does not conflict with any of the other decisions cited by the O'Quinn Plaintiffs. Simply put, whether litigated in the Second, Third, Seventh, or Eleventh Circuits, the result obtained in the decision below would have been exactly the same under any of the purportedly "conflicting" tests applied in those Circuits.[6]

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[6] For example, as demonstrated above, the Implant Claims against the Nondebtor Codefendants have a "significant connection" to DCC's bankruptcy, as required by the Second Circuit in *Turner v. Ermiger (In re Turner)*, 724 F.2d 338 (2d Cir. 1983). The result would also be the same under the test established in the Eleventh Circuit, which adopted the *Pacor* test for determining the existence of related to jurisdiction in *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th

4. The *Celotex* Decision

In addition to being consistent with decisions of other circuit courts of appeals, the decision below is consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). In *Celotex*, petitioner Celotex posted a supersedeas bond with an insurance company serving as surety in order to stay execution of a tort judgment rendered against it in the district court, pending appeal. Celotex's obligations under the bond were secured by its pledge of certain settlement proceeds. *Id.* at 1496. After the Fifth Circuit affirmed the judgment, Celotex filed for chapter 11 bankruptcy. *Id.* The bankruptcy court subsequently issued an injunction that prohibited judgment creditors from proceeding against sureties without bankruptcy court permission. When a judgment creditor nonetheless sought permission from another court to execute against the bond, permission was granted. *Id.* at 1497.

This Court held that the judgment creditor was bound by the bankruptcy court's injunction and rejected the argument that the bankruptcy court lacked jurisdiction to issue the injunction, citing *Pacor* with approval. Specifically, this Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. . . . We agree with the views expressed in *Pacor* . . . that "Congress intended to grant comprehensive jurisdiction to the bankruptcy

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Cir. 1990). In addition to interpreting § 1334(b) to "avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of *all matters connected to the debtor's estate*," *id.* at 787 (emphasis added), the Eleventh Circuit concluded that an overlap between a debtor's affairs and another dispute is insufficient to confer § 1334(b) jurisdiction "unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." *Id.* at 789. As demonstrated above, the Implant Claims against the Nondebtor Codefendants significantly affect DCC's estate, satisfying the Eleventh Circuit's interpretation of *Pacor*.

> courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of § 1334(b) must be read to give district courts . . . jurisdiction over more than simple proceedings involving the property of the debtor or the estate. We also agree with that Court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.

Id. at 1499 (quoting *Pacor*, 743 F.2d at 994). The Court explicitly recognized that proceedings "related to" a bankruptcy include "suits between third parties which have an effect on the bankruptcy estate," *id.* at 1498-99 n.5, and that the "jurisdiction of bankruptcy courts may extend more broadly in [a chapter 11 reorganization] case than in [a chapter 7 liquidation]." *Id.* at 1500.

Using the test established in *Pacor*, this Court determined that because the judgment creditor's immediate execution on the bond would, in turn, result in the insurer's efforts to foreclose on the collateral posted by Celotex, the judgment creditor's proceeding against the insurer "would have a direct and substantial adverse effect" upon Celotex's ability to reorganize, and therefore, was "related to" Celotex's bankruptcy:

> Admittedly, a proceeding by respondents against [the insurer] on the supersedeas bond does not directly involve Celotex, except to satisfy the judgment against it secured by the bond. But to induce [the insurer] to serve as surety on the bond, Celotex agreed to allow [the insurer] to retain the proceeds of a settlement resolving insurance coverage disputes between [the insurer] and Celotex. The Bankruptcy Court found that allowing respondents—and 227 other bonded judgment creditors—to execute immediately on the bonds would have a

> direct and substantial adverse effect on Celotex' ability to undergo a successful reorganization.

Id. The Court thus found that subject matter jurisdiction existed over a proceeding between nondebtors that would, in the future, directly affect the estate if the insurer (i) filed a motion for relief from the automatic stay imposed by § 362 of the Bankruptcy Code and (ii) commenced and won an action to foreclose on the collateral securing the bond.

Consistent with and explicitly citing and following this Court's decision in *Celotex*, the Sixth Circuit's decision below held that the resolution of the Implant Claims against the Nondebtor Codefendants would have a direct and substantial effect on DCC's ability to undergo a successful reorganization because the thousands of potential claims for indemnification and contribution could ripen into fixed claims, entitling DCC and the Nondebtor Codefendants to recover on their claims against each other.[7]

In order to complete its reorganization, DCC's liability for implant claims must be determined or estimated. Because the amount (if any) of DCC's liability for implant claims is, in part, a function of the Nondebtor Codefendants' share (if any) in the liability for the same plaintiffs' claims, a determination of DCC's liability cannot be made until the amount of damages (if any) awarded against the Nondebtor Codefendants, and DCC's allocable share thereof, are determined. The Sixth Circuit's holding that the Implant Claims against the Nondebtor Codefendants could conceivably have an effect on DCC's estate is thus completely consistent with this Court's decision in *Celotex*.

In short, petitioners' assertion that the decision below conflicts with *Celotex* and decisions of other circuit courts of

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[7] The fact that the claim in *Celotex* was secured and the claims in the decision below are unsecured is a distinction without a difference. Both claims affected the administration of the respective debtor's estate.

appeals simply obscures petitioners' true contention, which is that the Sixth Circuit misapplied the well-settled rule of law regarding "related to" jurisdiction. As noted above, a petition for certiorari is rarely granted when the asserted error consists of the alleged misapplication of a properly stated rule of law.

5. No Misapplication of Law

In any event, petitioners' allegations of misapplication are without merit. Petitioners' theory that jurisdiction under 28 U.S.C. § 1334(b) cannot exist over the Implant Claims against the Nondebtor Codefendants is based on the erroneous premise that the resulting claims-over for indemnification or contribution are not claims at all, either because they have not been formally asserted or because they are contingent.

First, petitioners' representation that the Nondebtor Codefendants have not pursued claims for contribution is wrong. In addition to ignoring that the Nondebtor Codefendants may have claims for *indemnification* in addition to claims for contribution, petitioners ignore the fact that 3M has repeatedly asserted such claims throughout DCC's chapter 11 bankruptcy. In fact, the decision below recognized that 3M and the other Nondebtor Codefendants have "asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time."[8] Tort Comm. Pet. App. 20a. Additionally, respondent is under no obligation to file a formal proof of claim form prior to the January 15, 1997 bar date established in DCC's bankruptcy case.[9]

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[8] Upon information and belief, more than 10,000 such proofs of claim have already been filed in DCC's bankruptcy by one or more Nondebtor Codefendants based upon the Implant Actions.

[9] 3M's right to file a proof of claim is not affected in any way by the fact that claims-over were not previously asserted in the Implant Actions. The decision to wait to file such claims followed routine procedures, since a defendant that is sued as an alleged joint tortfeasor is not

Second, the contingent nature of a bankruptcy claim does not render that claim uncognizable. Petitioners' theory is completely contrary to the broad definition of a "claim" set forth in § 101(5) of the Bankruptcy Code, which explicitly includes contingent claims. *See* 11 U.S.C. § 101(5) (defining claim as a "right to payment, whether or not such right is reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

Labeling a claim "contingent" does not mean it cannot have an impact on a debtor's estate. Implant Claims will result in fixed claims-over against DCC to the extent the Nondebtor Codefendants pay plaintiffs to satisfy a liability jointly held with DCC. Conversely, the potential claims-over of DCC against the Nondebtor Codefendants are valuable assets of DCC's estate, which are affected by the plaintiffs' suits against the Nondebtor Codefendants. Both types of claims-over—those asserted against DCC and those asserted by DCC—must be dealt with in some fashion under DCC's plan of reorganization. It necessarily follows, then, that the very real Implant Claims against the Nondebtor Codefendants will have a substantial effect on DCC's estate.

C. The Sixth Circuit Correctly Interpreted 28 U.S.C. § 157(b)(5)

The argument that the Sixth Circuit misinterpreted 28 U.S.C. § 157(b)(5) is equally without merit, and does not provide an alternative basis for the Court to grant the writ.

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required to assert a claim for contribution against a codefendant in the same action. *See* 18 Am. Jur. 2d *Contribution* § 9 (1985) ("the right to sue [for contribution] arises when a party has paid the whole of the obligation or more than his share thereof. In either event the right to contribution is merely contingent until payment or its equivalent is made, and not until then does it become complete"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .").

A necessary condition to implementing the reorganization policy underlying the bankruptcy laws is the centralization in one forum, to the maximum extent permitted by the United States Constitution, of all the debtor's assets, as well as a process for dealing with all the debtor's liabilities.[10] Consistent with congressional intent and the words of the Bankruptcy Code, the Sixth Circuit properly construed § 157(b)(5) to permit centralization of claims against nondebtors in cases where the failure to centralize would harm the debtor's prospects of reorganization. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011 (4th Cir. 1985) (congressional purpose of § 157(b)(5) was to "centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ") (quoting 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)), *cert. denied*, 479 U.S. 876 (1986).

Petitioners' argument is based on the erroneous premise that § 157(b)(5) can never authorize the transfer of claims against nondebtors. Because the language of the statute, the legislative history, and the case law do not support this assertion, however, petitioners do not, indeed cannot, cite any authority to support their proposition.

Section 157(b)(5) applies to "personal injury tort and wrongful death claims." It does not contain *any* limitations. Petitioners' argument that Congress must have meant personal injury or wrongful death claims against the estate because a different section (§ 157(b)(2)(B)) does refer to claims against the estate, is completely without merit.[11]

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[10] Congress has provided the bankruptcy courts with powerful tools in order to accomplish these goals: *see, e.g.*, 28 U.S.C. § 1334(e) (exclusive jurisdiction of district court over all debtor's property wherever located); 11 U.S.C. § 541(a) (creation of estate comprised of property wherever located); 11 U.S.C. § 105(a) (nationwide service of process).

[11] Additionally, the warning that respondents' interpretation of § 157(b)(5) would conflict with the MDL proceedings is factually erro-

As discussed *supra*, this Court has held that 28 U.S.C. § 1334(b) applies not only to actions against debtors, but also to actions against nondebtors. *See Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 n.5 (1995) (proceedings "related to" bankruptcy include "suits between third parties which have an effect on the bankruptcy estate"). It follows, then, that other provisions of title 28 of the United States Code which are related to § 1334(b) should be interpreted in a consistent manner with that section. As this Court has stated, statutory construction is

> a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988).

Moreover, the Implant Claims against the Nondebtor Codefendants are, in effect, claims against DCC. As discussed *supra*, the claims against DCC are inextricably intertwined with the claims against respondent and the other Nondebtor Codefendants because plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. *Cf. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action"). As the decision

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neous. The District Court's jurisdiction to transfer claims for *trial purposes* is entirely compatible with the limited jurisdiction that is being exercised by the Multidistrict Court which, as pointed out by petitioner, coordinates *pretrial proceedings*. Tort Comm. Pet. 7. Moreover, the Multidistrict Court has no jurisdiction over state court implant claims that are the subject of the decision below. Accordingly, the statement that the centralization of the Implant Claims will disrupt the MDL system is in error.

below held, the nature of the Implant Claims establishes that DCC and the Nondebtor Codefendants are "closely related" with respect to the implant litigation. *See also Robins*, 788 F.2d at 999 (the unusual situation permitting § 362 to apply to nondebtors is the existence of "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor").

The Sixth Circuit's conclusion that § 157(b)(5) applies to claims against debtors as well as nondebtors is directly supported by the only circuit court of appeals decision directly on point—the *Robins* decision. Prior to the filing of its chapter 11 case, Robins was faced with 5,000 Dalkon Shield actions filed in state and federal courts throughout the United States. *Id.* at 996. Over half of such actions named the debtor as the sole defendant, while the remainder named as defendants both debtor and nondebtor parties, including the debtor's insurance company, hospitals, and physicians. The district judge granted the debtor's motion pursuant to § 157(b)(5) to transfer all 5,000 actions, including those against nondebtor defendants, to the district court in which the bankruptcy case was pending. The scope of the order was very clear and explicitly transferred claims against nondebtor codefendants:

> ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins *or any other defendant* that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further
>
> ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that *all actions based*

> *upon personal injury tort or wrongful death claims* arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further
>
> ORDERED that *all actions* related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court . . . .

In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985) (emphasis added).

On appeal, the Fourth Circuit confirmed the consolidation in the district court of all Dalkon Shield claims commenced against both the debtor and nondebtors:

> [T]here are very real considerations that support a centralization of *all* the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

Robins, 788 F.2d at 1011 (emphasis added). *See also Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994) (§ 157(b)(5) applied to transfer of wrongful death lawsuits naming two Pan Am debtors and one nondebtor Pan Am affiliate).

Petitioners argue that the *Robins* decision should be ignored because no transfer of claims actually occurred. What petitioners fail to state, however, is that after the Fourth Circuit concluded that centralization would be the rule, the parties

reached a settlement in connection with a plan of reorganization. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving settlement), *cert. denied*, 493 U.S. 959 (1989). The fact that the physical transfer of claims under § 157(b)(5) was rendered unnecessary as a result of the settlement has absolutely no bearing on the correctness or ultimate efficacy of the Fourth Circuit's decision. Indeed, because the decision below is entirely consistent with the Fourth Circuit's decision in *Robins*, petitioners have failed to demonstrate the existence of a circuit split regarding the interpretation of § 157(b)(5), which is a further reason for the Court to deny the Petitions.

Accordingly, because the decision below interpreted 28 U.S.C. §§ 1334(b) and 157(b)(5) correctly, does not conflict with the decision of any other court of appeals, and is consistent with this Court's decision in *Celotex*, the Court should deny petitioners' request for a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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November 27, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

In Re:

DOW CORNING CORPORATION,

Debtor.

HON. DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. *INTRODUCTION:*

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS*:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatary abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under

the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11*;
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section

157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> ... federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof, of the scope of

> the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> ... in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, ... at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The

Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION*:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: JUL 30 1996

Nos. 96-330 & 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) is reviewable by this Court in light of the present procedural posture of the case?

2. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) conflicts with the decisions of other Courts of Appeals regarding the scope of "related to" jurisdiction under 28 U.S.C. § 1334(b)?

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent Bristol-Myers Squibb Company states that it does not have a parent company. The subsidiaries (other than wholly owned subsidiaries) of Bristol Myers Squibb Company are:

Bristol-Myers Lion Ltd.
Bristol-Myers Squibb G.M.B.H.
Mead Johnson (Guangzhou) Ltd.
P.T. Squibb Indonesia
Synbiotics Limited
Laboratories UPSA SAS
RCS Realty Corporation
Sino American Shanghai Squibb Pharma Ltd.
Squibb Nigeria Limited
2309 Realty Corporation

Respondent Medical Engineering Corporation states that it is a wholly owned subsidiary of Bristol-Myers Squibb Company. Medical Engineering Corporation does not have any subsidiaries (other than wholly owned subsidiaries).

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COUNTER-STATEMENT OF THE CASE

Respondents Bristol-Myers Squibb Company ("BMS") and Medical Engineering Corporation ("MEC"; collectively, "Respondents") respectfully pray that the petitions of the Official Committee of Tort Claimants (the "Tort Committee") and the breast implant claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Claimants"; collectively, the "Petitioners") for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) be denied.

A. Breast Implants and the Bankruptcy of Dow Corning

Petitioners' requests for certiorari arise from the chapter 11 bankruptcy proceedings of Dow Corning Corporation ("Dow Corning" or the "Debtor") pending in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division (the "Bankruptcy Court"). Dow Corning, a financially healthy company, was driven into bankruptcy by an avalanche of actions brought against it for injuries allegedly sustained by recipients of silicone-gel breast implants.[1]

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[1] As of May 15, 1995, the date on which it filed for bankruptcy, Dow Corning had been named as a defendant in more than seven thousand suits. Despite the avalanche of suits, and in contrast to the assertions made by the Tort Committee on page 5 of its Petition, there has never been any reliable scientific evidence to support the claim that silicone-gel breast implants cause autoimmune or other systemic disease. *See generally* Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case*, (W.W. Norton & Co. 1996).

Like Dow Corning, Respondents and others[2] are named as defendants in thousands of suits seeking damages for injuries allegedly caused by silicone-gel breast implants. In many of these suits, Dow Corning is named as a party defendant with Respondents because: (i) it supplied silicone gel (or other silicone components) to the Respondents; or (ii) the actions involve implants manufactured by both MEC[3] (or one of its predecessors) and Dow Corning. Additionally, in the vast majority of these actions, the plaintiffs assert that Dow Corning and Respondents are joint tortfeasors.

B. Consolidation and the Global Settlement

Due to the rapidly growing number of breast implant suits being commenced in federal courts, the Judicial Panel on Multidistrict Litigation (the "MDL"), on June 25, 1992, ordered the transfer of all breast-implant actions pending in the federal courts to the Honorable Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern Division of Alabama (Southern Division) for the coordination of pretrial proceedings. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992). In transferring these actions, the MDL determined that consolidation of all federal implant actions would avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve the parties' resources. *Id.*

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[2] Baxter International Incorporated, Baxter Healthcare Corporation (collectively, "Baxter"), Minnesota Mining and Manufacturing Company ("3M"), and Dow Corning's parent corporations, The Dow Chemical Company and Corning, Inc. (together, the "Shareholders"). Collectively, Respondents, Baxter, 3M and the Shareholders are referred to herein as the "Non-Debtors."

[3] BMS never designed, manufactured, marketed or sold any silicone gel breast implants or any material or components for such implants. Rather, since 1982 it has owned all of the shares of MEC, which manufactured, sold and distributed breast implants from 1969 to 1991.

By Order dated April 1, 1994, Judge Pointer preliminarily certified one class action for settlement purposes. On September 1, 1994, Judge Pointer approved a complex settlement agreement (the "Global Settlement") between members of the Settlement Class and certain defendants that contemplated the creation of a $4.25 billion settlement fund. Approximately 440,000 claimants registered as potential participants in the Global Settlement. Because of: (i) the large number of opt outs; (ii) the large number of claims against the settlement fund; and (iii) the bankruptcy of Dow Corning, a revised settlement program, which did not include Dow Corning, was approved by Judge Pointer by Order dated December 22, 1995 (the "Revised Settlement Program"). Several appeals have been taken from the Revised Settlement Program, which are presently pending in the Eleventh Circuit.

Pursuant to the Revised Settlement Program, 3M, Baxter, and Respondents will pay benefits to breast implant recipients which are assured and not subject to further reduction. Breast implant recipients are presently electing whether to accept the Revised Settlement Program, which provides for extended opt-out periods.

C. Removal of State Court Cases and The Transfer Motion

On June 5, 1995, following Dow Corning's filing for bankruptcy, Respondents along with the Debtor, Baxter and 3M began removing pending state court cases in which one or more plaintiffs in each suit had opted out of the Global Settlement and in which Dow Corning was a party (the "Opt-Out Actions") pursuant to 28 U.S.C. § 1452(a). Thereafter, on June 14, 1995, Respondents filed a motion in the United States District Court for the Eastern District of Michigan, Southern Division (the "District Court") seeking, *inter alia*, that the Court transfer the Opt-Out Actions to the District Court pursuant to 28 U.S.C. § 157(b)(5) (the "Transfer

Motion"). The Debtor, Baxter and 3M also filed similar motions.

On July 31, 1995, the District Court heard oral argument on the Transfer Motion. By Order and Opinion dated September 12, 1995 (the "September 12th Order"), the District Court denied the Transfer Motion. *See In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. 1995).[4] The District Court denied the Transfer Motion because it determined that no federal jurisdictional existed, under either "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) or supplemental jurisdiction under 28 U.S.C. § 1367(a).

D. Reversal by the Sixth Circuit

Respondents appealed from the September 12th Order. On April 9, 1996, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") issued an opinion and order reversing the September 12th Order. 81 F.3d 635 (6th Cir. 1996). That opinion and order was subsequently withdrawn and on June 3, 1996, the Sixth Circuit issued an amended opinion and its mandate. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) ("*Lindsey*"). In *Lindsey*, the Sixth Circuit determined, *inter alia*, that the claims pending against Non-Debtors were "related to" the Debtor's bankruptcy under 28 U.S.C. § 1334(b).[5] In reversing the September 12th Order, the Sixth Circuit remanded the matter to the District Court to determine

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[4] In a companion opinion, *In re Dow Corning Corp*, 187 B.R. 919 (E.D. Mich. 1995), the District Court refused to transfer the Opt-Out Actions pending against the Shareholders.

[5] Because the Sixth Circuit determined that "related to" jurisdiction existed, it did not address whether the District Court erred in determining that supplemental jurisdiction did not exist under 28 U.S.C. § 1367(a).

whether the Opt-Out Actions should be transferred to the District Court in accordance with 28 U.S.C. § 157(b)(5). *Id.* at 498. In connection with that determination, the Sixth Circuit noted that the District Court would be required to conduct an abstention analysis:

> to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of the bankruptcy cases."

Id. at 497 (quoting *Kelley v. Nodine* (*In re Salem Mortgage Co.*), 783 F.2d 626, 635 (6th Cir. 1986)).

E. Abstention Order and Further Proceedings

Although barely referenced by Petitioners,[6] following *Lindsey*, the District Court, on July 30, 1996, entered an order (the "Abstention Order") abstaining *en masse* under 28 U.S.C. § 1334(c) from transferring the Opt-Out Actions.[7] The Abstention Order is reprinted at 1a-8a. Thereafter, on August 13, 1996, each of the Respondents filed a notice of appeal with the District Court. On August 23, 1996, the Tort Committee filed a motion (the "Dismissal Motion") to dismiss the appeals. Respondents served their opposition papers on September 3, 1996.

On September 24, 1996, the Sixth Circuit entered an order directing that the Dismissal Motion be addressed in connection with the merits of the appeal. The Sixth Circuit order is reprinted at 9a-10a. The Sixth Circuit also expedited the

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[6] It is not until page 11 of its Petition that the Tort Committee notes: "[I]t happens that in this case, following the reversal and remand, the district court concluded that it should abstain . . ." Tort Committee Pet. at 11. The O'Quinn Claimants relegate this important fact to a footnote. O'Quinn Claimants Pet. 2-3 n.2.

[7] The Tort Committee filed its petition for certiorari on August 27, 1996,—a month after the District Court entered the Abstention Order. The O'Quinn Claimants served their original petition on August 29, 1996 and filed a corrected petition on November 12, 1996.

briefing schedule. As of November 19, 1996, the appeal has been fully briefed. Respondents have not been notified of the date for oral argument.

REASONS FOR DENYING THE WRIT

The *Lindsey* decision presents no important or novel legal question which would justify the issuance of a writ of certiorari. Initially, due to the District Court's decision to abstain, the issues sought to be reviewed are not presently justiciable. Because the Abstention Order has not yet been reversed by the Sixth Circuit, Petitioners seek review of issues that are at best not yet ripe for determination. At worst, assuming the Sixth Circuit does not reverse the Abstention Order, the petitions seek review of moot issues and the issuance of an advisory opinion from the Court. In any event, certiorari is not warranted at this time.

Moreover, contrary to Petitioners' assertions, the *Lindsey* decision neither conflicts with decisions of other Courts of Appeals nor represents "an unprecedented expansion of bankruptcy jurisdiction." Tort Committee Pet. at 4. The asserted "conflicts" are not genuine and simply reflect applications of the same or similar legal principles to different factual situations.

I.

Certiorari Should Be Denied Because There Are No Justiciable Issues Before the Court

Since *Marbury v. Madison*, 5 U.S. 137 (1803), the Court has recognized that judicial power of the federal courts is limited to "cases or controversies" under Article III of the Constitution. A "case or controversy" must be justiciable and not be moot, a political question or a request for an advisory opinion. *See United States v. Richardson*, 418 U.S. 166, 171 (1974). (citations omitted).

As Chief Justice Hughes explained in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937),

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

As demonstrated herein, while the issues raised by Petitioners may be intellectually stimulating, there are no justiciable issues to be determined in light of the Abstention Order. Whether these issues will ultimately become justiciable is wholly dependent upon the present appeal pending before the Sixth Circuit.[8] Regardless of the Sixth Circuit's ultimate determination, certiorari should be denied at this time. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (dismissing certiorari as improvidently granted, the Court stated: "this Court does not sit to satisfy a scholarly interest in such [abstract] issues").

A. Petitioners Seek Review of an Interlocutory Order

In *Lindsey*, the Sixth Circuit determined that the District Court has subject matter jurisdiction over the Opt-Out Actions and that transfer of the actions pending against the Non-Debtors under 28 U.S.C. § 157(b)(5) is permissible. *Lindsey*, 86 F.3d at 497; *accord A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). The matter was then remanded to the District Court and thereafter the Abstention Order was entered.

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[8] As of November 19, 1996, the appeal was fully briefed. Respondents have not been notified of the date for oral argument.

Initially, the *Lindsey* decision is an interlocutory order that is not reviewable at this time. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (certiorari denied because the Court of Appeals remanded the case so the matter was not ripe for review by the Supreme Court). In general, the Court does not exercise certiorari jurisdiction prior to a lower court issuance of a final judgment. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372 (1893). In *American Constr.*, Justice Gray noted:

> Whether an interlocutory order may be separately reviewed by an appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree . . . unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Id. at 384; *see also Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree.") (citation omitted).

B. The Issues Raised in the Petitions Are Not Ripe

Certiorari is not appropriate because the issues sought to be reviewed are not ripe. As one Circuit Court has noted:

> [the] [r]ipeness doctrine is drawn from both Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

Metzenbaum v. FERC, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982) (quoting from C. Wright, A. Miller & E. Cooper, 13 *Federal Practice and Procedure: Jurisdiction* § 3532, at 237-38 (1975)).

Whether a decision is ripe for adjudication is "peculiarly a question of timing." *Anderson v. Green*, ___ U.S. ___, 115 S. Ct. 1059, 1060 (1995), *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *See Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981). Underlying the ripeness doctrine is the concept that courts should decide only a "real, substantial controversy", not a mere hypothetical question. *See City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989) (citation omitted).

In this case, the Abstention Order vitiated, at least for the time being, any practical effect of the determination in *Lindsey* that Petitioners seek to have this Court review. The issues raised in the Petitions ceased to be ripe when the District Court abstained and will only become ripe again if the Sixth Circuit reverses the Abstention Order and a final order is entered granting the Transfer Motion—future contingencies that may not occur. Accordingly, the issues raised by Petitioners are presently not ripe for adjudication.

C. Should the Sixth Circuit not Reverse the Abstention Order, the Issues Raised by Petitioners Are Moot

If the Sixth Circuit were to affirm the Abstention Order (or alternatively dismiss the appeals), the issues raised by the Petitioners would be moot. A moot controversy is one "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (citation omitted). A moot case is not a "case or controversy" under Article III of the Constitution. *St. Pierre v. U.S.*, 319 U.S. 41, 42 (1943) ("a

federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it"); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Because a moot controversy does not contain "live" issues, review will result in the issuance of an advisory opinion in contravention of Article III of the Constitution. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). The limited exception to the mootness rule for cases that fall under the doctrine of "capable of repetition, yet evading review" is inapplicable in this case. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Although the O'Quinn Claimants purport that this exception is applicable to the instant case, it is not. O'Quinn Claimants Pet. at 2-3. In order for an action "to be capable of repetition, yet evading review", two elements must be satisfied: (i) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (ii) there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Assuming, *arguendo*, that the issues raised by Petitioners are "capable of repetition", they most certainly do not evade review.[9] For example, if the Sixth Circuit were to

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[9] In cases where the Court has invoked the "capable of repetition yet evading review" exception, the matter sought to be reviewed was of a limited duration. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975) (residency requirements); *Super Tire Engineering Corp. v. McCorkle*, 416 U.S. 115 (1974) (economic strikes); *Roe v. Wade*, 410 U.S. 113 (1973) (pregnancy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (elections).

reverse and the Opt-Out Actions were to be transferred, the issues would no longer be moot and the Court could consider petitions for a writ of certiorari in the normal course. Similarly, if the same parties were to be subjected to this treatment again, it would be in the context of the transfer of the Opt-Out Actions which would not be of such a limited duration so as to avoid review.[10]

In sum, the issues raised by the Petitioners are not presently justiciable and certiorari should be denied.

II.

The Decision in *Lindsey* Would Be The Same Under Any Of The Tests For Determining "Related to" Jurisdiction

Even if the Court were to consider the issues raised in the petitions in the context of a final decision, certiorari should still be denied. Contrary to Petitioners' assertions, the decision in *Lindsey* is not in conflict with *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984) or *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Indeed, in issuing its ruling, the Sixth Circuit explicitly relied on the test for determining "related to" jurisdiction set forth in *Pacor*.[11]

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[10] The Tort Committee acknowledges this fact when it improperly characterizes the motives of the Non-Debtors. *See* Tort Committee Petition at 11 (noting that if the Opt-Out Actions were transferred, they would continue for an indefinite period).

[11] Similarly, *Lindsey* does not represent an "enormous destructive change in the American Tort System" or "violate[ ] basic principles allocating tort jurisdiction in our federal system" as the Tort Committee asserts. Tort Committee Pet. at 9. In *A.H. Robins v. Piccinin*, 788 F.2d 994, *cert. denied*, 479 U.S. 876 (1986), the Fourth Circuit considered similar issues and determined that actions pending against non-debtors were subject to transfer to the district where the Robins case was pending. Petitioners do not assert that a conflict among the Circuits exists with respect to the proper interpretation of 28 U.S.C. § 157(b)(5). Accordingly, certiorari is not appropriate as to that issue.

"Related to" jurisdiction stems from Section 1334(b) of Title 28 which provides, in relevant part, that:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

As this Court has previously noted, the scope of "related to" jurisdiction is not defined, but Congress intended it to be broad:

> Congress did not delineate the scope of 'related to'. . . jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. . . . We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that **'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected to the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts jurisdiction over more than simple proceedings involving the property of the debtor or the estate.'**

Celotex Corp. v. Edwards, ___ U.S. ___, 115 S. Ct. 1493, 1498-99 (1995) (emphasis supplied).

Petitioners' assertion that *Lindsey* conflicts with *Pacor* is unfounded. Initially, in determining that the District Court had "related to" jurisdiction over the Opt-Out Actions and that such actions were subject to transfer under 28 U.S.C.

§ 157(b)(5), the Sixth Circuit relied explicitly on the test set forth in *Pacor*:

> As stated in [*Pacor*], the "usual articulation of the test for determining whether civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*
>
> * * * *
>
> Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 . . . . The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction.

Id. at 489 (citations omitted). Virtually every Court of Appeals has embraced the test enunciated in *Pacor*, sometimes with minor modifications.[12]

While *Lindsey* explicitly relied on *Pacor*[13], Petitioners seem to take issue because of the difference in the holdings of these two cases. Initially, to the extent that Petitioners seek redress

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[12] *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, (4th Cir.) *cert. denied*, 479 U.S. 876; *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-84 (6th Cir. 1990); *In re Dogpatch U.S.A.,Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990).

[13] Consistent with *Pacor*, the Sixth Circuit recognized that "related to" jurisdiction is not limitless. *Id.* at 490.

from the Court because they are displeased with the result in *Lindsey*, certiorari jurisdiction should not be exercised for the "the benefit of the particular litigants", but instead for the settlement of [issues] of importance to the public, as distinguished from . . . the parties." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969) (Harlan, J. dissenting) (citations omitted); *see also* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Moreover, the Tort Committee seems to suggest that a definite finding of liability is required under the *Pacor* test. Tort Committee Pet. at 14. Such a finding is not required:

> A key word in [the] test is "conceivable." Certainty, or even likelihood is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (quoting *In re Smith*, 866 F.2d 576 (3d Cir. 1989)) (other citations omitted). Finally, the Sixth Circuit explained the difference in the outcome between *Lindsey* and *Pacor*:

> The potential for Dow Corning's being held liable to the non-debtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the over-

> whelming number of cases asserted against Dow Corning and the non-debtor defendants in this case.

Id. at 494. Accordingly, *Lindsey* does not conflict with *Pacor*.

In addition, Petitioners assert that *Lindsey* "significantly diverges" from *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Committee Pet. at 12. In fact, the result in *Lindsey* would be no different if the test in *Fedpak* were applied.[14]

In *Fedpak*, the debtor Fedpak Systems, Inc. ("Fedpak") was the developer and patent holder on a frozen dessert machine. *Id.* at 209. Shortly after filing for bankruptcy, Fedpak commenced a breach of contract action against Stanley Jones ("Jones"). *Id.* The Fedpak/Jones litigation was subsequently settled on appeal and Fedpak thereafter transferred all of its intellectual property rights in the machines to Polar Express International, Inc. ("Polar Express") in exchange for royalty payments. *Id.* at 210. Years later, at the request of Polar Express, Fedpak filed a motion seeking clarification of the findings of facts and conclusions of law issued by the bankruptcy court in the Fedpak/Jones Litigation.

On appeal, the Seventh Circuit noted that Fedpak did not have standing to request such an order. *Id.* at 212. Additionally, the Court noted that the bankruptcy court lacked jurisdiction to determine the rights of Jones and Polar Express to property outside of the Court's control. *Id.* at 213. In so ruling, the court set forth its test for determining jurisdiction: "[a] case is related to a bankruptcy case when the dispute 'affects the amount of property available for distribution [*i.e.*,

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[14] Equally unavailing is the assertion of the O'Quinn Claimants that the decision in *Lindsey* conflicts with that of *In re Turner*, 724 F.2d 338 (2d Cir. 1983) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). In *Lemco*, the Eleventh Circuit stated: "[w]e join the majority of the circuits that have adopted the *Pacor* formulation." *Id.* at 788. Moreover, the Opt-Out Actions have a "significant connection" with the Debtor's bankruptcy as required under *Turner*. *Turner, supra*, 724 F.2d at 341.

the debtor's estate] or the allocation of property among creditors.' " *Id.* at 213-14 (citations omitted).

Despite the Petitioners' assertions to the contrary, the *Fedpak* test does not "significantly diverge" from that of *Lindsey*. Indeed, in the instant case, application of the *Fedpak* test would not have changed the result. Unlike the thousands of claims pending against the Debtor, the claim in *Fedpak* was but a single claim. Moreover, as the Sixth Circuit noted, the claims for indemnification and contribution whether asserted by or against the Debtor will undoubtedly "affect the size of the estate"—*i.e.*, the amount of property available for distribution—as well as the Debtor's "ability to resolve its liabilities and proceed with reorganization"—*i.e.*, allocation of property among creditors. *See Lindsey*, 86 F.3d at 494.

In sum, there is no conflict among the Circuits with respect to "related to" jurisdiction and Petitioners' requests for certiorari should be denied.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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Dated: November 26, 1996

Appendix "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

HON. DENISE PAGE HOOD

In Re:

DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(c) ABSTENTION

I. *INTRODUCTION*:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case

on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS*:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatary abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims

which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the non-debtors. The personal injury tort actions against the non-debtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative"

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra.*) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A Non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11*;
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . .in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the non-

debtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p.5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43 and 44; 11 U.S.C. §524(e). If the Court does aid abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. §524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43 and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the inter-

ests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION*:

This court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1)

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

/s/ _____
DENISE PAGE HOOD
United States District Judge

DATED: Jul 30, 1996

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-2005/2008/2009/2010/2011/2012/2013

HEIDI LINDSEY, Rep. of Charlotte Mahum and Cheryl Kahn, et al.,

Plaintiff,

TORT CLAIMANT, Official Committee of Tort Claimants; et al,

Plaintiff-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTHCARE PROVIDERS OF CONNECTICUT; et al,

Defendants,

DOW CORNING CORPORATION (96-2009); THE DOW CHEMICAL COMPANY (96-2005); BAXTER INTERNATIONAL INCORPORATED (96-2011); MINNESOTA MINING AND MANUFACTURING COMPANY (96-2010); BRISTOL-MYERS SQUIBB COMPANY (96-2013); and MEDICAL ENGINEERING CORPORATION (96-2012),

Defendant-Appellant.

Before: MARTIN and BATCHELDER, *Circuit Judges*; and WISEMAN, *District Judge.**

ORDER

These appeals are from the district court's memorandum opinion and order regarding abstention pursuant to this court's remand. The Official Committee of Tort Claimants moves to dismiss the appeals, and the various appellants respond in opposition. The jurisdictional issue shall be argued along with the merits of the appeals.

It is ORDERED that the clerk enter an expedited briefing schedule in this matter. Upon completion of briefing, the cases shall be submitted for argument upon the briefs and the motion to dismiss.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

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* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.